# United States Court of Appeals for the Second Circuit



**APPENDIX** 



## 75—7381

### United States Court of Appeals

For the Second Circuit

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs-Appellees,

1:5

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York

#### **APPENDIX**

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PAGINATION AS IN ORIGINAL COPY

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(Numbers in parentheses indicate the number of the item in the Index of the Record) MAZELL PEOPLES, CHRISTINE ANNIE BARNES, CHRISTINE PEYTON, IN TOLLIVER, ELIZABETH MINNIEFIELD, ANN SCRUGGS, BLANCHE AND AND EVELYN PERKINS,

011- 70 . 9

Plaintiffs

CCMPLAINT

JOSEPH W. McGOVERN, Chancellor of the

-VS-

Loard of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF RIGENIS OF THE STATE OF NEW YORK; and D.L. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants

#### Nature of the Case and Jurisdiction

1. This is an action under the Civil Rights Act, 42 U.S.C. §1983, to declare unconstitutional a policy strument by the Regents of the State of New York which has the purpose, intent, and effect of preventing the New York State Commissioner of Education from fulfilling his statutory and constitutional mandate to desegregate the public schools of the State of New York. Jurisdiction is based on 28 U.S.C. §1343(3),(4), 2201, 2202.

#### Plaintiffs

2. (a) Plaintiffs Mary Anderson, Mazell Peoples, Christine James,
Annie Barnes, Christine Peyton, Francine Tolliver, Elizabeth Minnifield,
Yvonne Henley, and Ann Scruggs are residents of the City of Lackawanna and
are appellants in the Matter of Sylvers, 10 Ed. Dept. Rep. 122 (June 20, 1972),
Ed. Dept. Rpt. \_\_\_, No. 8951 (Jan. 14, 1975); No. 8805 (April 4, 1974).

(b) Plaintiffs Blanche Thomas and Evelyn Perkins are residents of the City of Buffalo and are appellants in the Matter of Yerby Dixon, 4 Ed. Dept. Rep. 115 (Feb. 15, 1965); \_\_\_ Ed. Dept. Rpt. \_\_\_, No. 8949 (Jan. 14, 1975).

#### Defendants

- 3. (a) Defendant Joseph W. McGovern is Chairman of the Board of Regents of the State of New York; he is sued as representative of the Board. The Board of Regents ("Regents") establish the policies and practices for the administration of the public school systems of the State of New York. Pursuant to N. Y. Educ. L. §207, they exercise legislative functions concerning the educational system of the system, and, except as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education. Mr. McGovern and the Board are sued in their official capacity.
- (b) Defendant Willard A. Genrich is a member of the Board of Regents and a resident of the Buffalo area, in Buffalo, New York. He is sued in his official capacity.
- (c) Defendant Ewald B. Nyquist is the Commissioner of Education of the State of New York. He is the chief executive officer of the state system of education and of the Board of Regents, pursuant to N. Y. Educ. L. §305. He has the responsibility for enforcing all laws relating to education and for executing all educational policies adopted by the Board of Regents. He has general supervision over all elementary and secondary schools, Lackawanna and including those in the public school systems of/Buffalo. He is sued in his official capacity.

#### Class Action

- 4. (a) Plaintiffs bring this action on behalf of themselves and all other parents of children in the Lackawanna and Buffalo public school systems.
- (b) This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to each member of the class and the claims of the representative plaintiffs are typical of the claims of each member of the class. The representative plaintiffs will fairly and adequately protect the interests of the class. The parties defendant have acted on grounds generally applicable to the plaintiffs' class and therefore declaratory relief is appropriate with respect to the class as a whole.

#### FACTUAL BACKGROUND

#### The Commissioner's Actions

- 5. In a statement of policy issued by defendant Regents in 1960, they adopted a policy that every child has a right to equal educational opportunity, without regard to race, national origin, religion or economic status, and that equality of educational opportunity cannot exist where children are segregated on the basis of race. That policy was repeated and elaborated in position papers and statements of policy issued by the Regents in 1968, 1969, and 1972.
- 6. (a) At present and for many years, the public school systems in the Cities of Buffalo and Lackawanna, in the State of New York, have suffered from a very high and increasing degree of racial imbalance and segregation, and Commissioner Nyquist has so found.
- (b) As a consequence thereof, plaintiffs filed appeals under N. Y. Educ. L. §310, alleging that the schools of Buffalo and Lackawanna were racially segregated. In the Matter of Yerby Dixon et al.; In the Matter of Cleola Mae Sylvers, et al.

A 3

- 7. (a) Efforts were begun by the Commissioner to implement the Regents' policies and to eliminate segregation in the Buffalo public schools.
  - (1) In a decision and order dated February 15, 1965, then
    Commissioner of Education James E. Allen found that the Buffalo
    school system was severely segregated and he ordered the Buffalo
    School Board to prepare and submit to him a plan for the progressive elimination of segregated schools in the City of Buffalo.
  - (2) The Buffalo Board of Education has failed to do so, despite the passage of almost 10 years since Commissioner Allen's opinion and order of February 15, 1965. Instead, and despite persistent efforts since January, 1972, by Commissioner Nyquist and his staff, the Board has explicitly refused to do so, and has exhibited what Commissioner Nyquist has called "wilful defiance."
  - (3) In August, 1973, Commissioner Nyquist prepared an order to the Buffalo School Board requiring it to show cause why a plan for the integration of the Buffalo public schools included in such an order should not be implemented immediately.
  - (4) A show cause order of this nature was not issued, however, until January 14, 1975. The order was made returnable on February 14, 1975, ten years almost to the day since the issuance of Commissioner Allen's order in the matter on February 15, 1965. A copy of the order of January 14, 1975 is attached hereto as Ex. A.
  - (5) In his decision and order of January 14, 1975, Commissioner Nyquist found that the Buffalo Board "has not only neglected to develop and implement a plan for racial integration of its schools, but by certain of its acts, procedures and policies, has increased

forth such acts, procedures and policies in detail. In case quence thereof, Commissioner Nyquist found that the Buffalo Board and "denied equality of educational opportunity to many of its children by reason of their race" and had thereby violated the Fourteenth Amendment to the United States Constitution.

- (b) Efforts were also begun by Commissioner Nyquist to implement the Regents' policies and to eliminate segregation in the Lackawanna public schools.
  - (1) In a decision and order dated February 8, 1971, Matter of Thomas, 10 Ed. Dept. Rep. 122, Commissioner Nyquist found that certain Lackawanna pupils were attending segregated and inferior schools.
  - (2) He had earlier ordered the Lackawanna Board to submit a voluntary plan but this order was not complied with.
  - (3) In a proceeding brought by plaintiff Sylvers, Commissioner Nyquist again ordered that a plan be submitted to him.
  - (4) This effort also proved unsuccessful and by a decision and order dated April 8, 1974, Commissioner Nyquist held that the Lackawanna Board had "rejected cooperative efforts to develop such a plan, which was set forth in such decision and order No. 8805.
  - (5) By decision and order dated January 14, 1975, Commissioner Nyquist ordered the Lackawanna School Board to show cause on February 10, 1975, three to four years after his initial ralings in the matter, why the plan set forth in the decision and order

of April 8, 1974, should not be implemented. \_\_\_\_ Fd. Dept.

Rep. \_\_\_\_, No. 8951 (Jan. 14, 1975). A copy of this decision and order is attached hereto as Ex. B.

- (c) Similar efforts were made by Commissioner Nyquist on January

  14, 1975 to integrate the public schools of Utica, Newburgh, and Mt. Vernon,

  by the issuance of orders requiring the school boards of those cities to

  show cause why specific plans for integration should not be adopted. In all

  five cases, Commissioner Nyquist noted that his efforts to obtain voluntary action

  to desegregate the boards of education of the five cities had not been

  successful.
- 8. (a) Commissioner Nyquist's plan for Buffalo, which was patterned on a plan prepared by the staff of the Buffalo Board of Education, called for each school in the district to "have a student population which represents a cross-section of the school population of the city." The plan was quite specific. See Ex. A, pp. 12-15.
- (b) Commissioner Nyquist's plan for Lackawanna set up similar racial proportions and was similarly quite specific. See No. 8805, pp. 3-5.

#### The Regents' Actions

- 9. (a) For many years, local opposition to racial integration of public schools in the State of New York has been strong. Recently, it has become even stronger.
- (b) For example, in 1969, the Legislature of the State of New York enacted L.1969, Ch. 342, which amended Education Law §3201 by preventing the Commissioner from assigning pupils or zoning schools in order to improve racial balance. That statute was struck down by this Court, in <a href="tect-v">1.00</a> V. Supp. 710 (W.D.N.Y. 1970) (3-judge), <a href="text-of-per-ph/4">1.51</a> 402 U.S. 9 ->

- (1971). While in force and before being held unconstitutional, it was intended to and did prevent the Commissioner from taking any significant steps to reduce segregation in the New York State public schools.
- (c) In 1972, and despite the decision in <u>Lee v. Nygeist</u>, the State legislature passed a bill similar to L.1969, Ch. 342, but this was vetoed because it was unconstitutional.
- 10. Despite the enactment of Ch. 342, the Regents continued to reiterate the need to integrate the New York State public school systems and to desegregate them. Some of the Regents, notably Dr. Kenneth B. Clark, sharply criticized Commissioner Nyquist for his failure to proceed more expeditiously in his efforts to desegregate the New York State public schools.
- 11. In 1974, four new Regents were appointed: Willard A. Genrich, Evelyn I. Griffith, William Jovanovich and Genevieve S. Klein. Upon information and belief, such Regents were questioned about their views on racial integration of the schools by members of the State legislature prior to and as a condition of their confirmation. In such questioning, the anti-integration views of such legislators were made clear to the Regents nominees, who agreed to oppose busing and to cooperate with legislators similarly opposed.
- 12. Upon information and belief, in June, 1974, several of the newly-appointed Regents sought to induce the Board of Regents to recede from the Regents' policy favoring integration of the schools. Such efforts did not produce any policy statement or formal policy change, but it did result in a postponement of show cause orders relating to Lackawanna.
- 13. In October, 1974, a further effort was made by certain Regents to induce the Board of Regents to recede from the Regents' policy favoring integration of the schools. This effort resulted in a policy statement dates

- 14. Upon information and belief, it was the understanding of at least several Regents that they had a "gentlemen's agreement" with Commissioner Nyquist that he would make no orders calling for transportation or other pupil reassignment methods of racial integration.
- 15. Despite such Regents' understanding, on January 14, 1975,
  Commissioner Nyquist issued the orders described herein.
- 16. These orders produced strong local hostility in the five cities affected and upon information and belief, from many of the Regents. In Buffalo, for example, the Corporation Counsel planned to seek an injunction against the February 14, 1975 hearing.
- 17. On January 22, 1975, the Regents issued a policy statement, which reads as follows:

"At a time when social changes in our society are both rapid and radical, it is important that public officials be sensitive and compassionate in their deliberations and decisions. The Regents are aware that in the matter of racial integration in the public schools of the State of New York there is at issue not only the development of young people but also their invediate and continuing welfare. The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origins to conduct their education together. Yet the Regents

recognize that we should not, in oursuit of that principle, ignore other rational and legally justifiable views of our citizenty.

"The Repents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy, that their view of integration is not based on quantitative measures of school population. Integration does not, by definition, require that racial quotas be used in determining the proper or desirable composition of population within a school. If a school district is making, and has made, a serious effort to bring about equal apportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents' statement of policy, imply quantitative racial balance in all schools within a district."

- 18. The policy statement of January 22, 1975, was issued as a direct response to Commissioner Nyquist's orders of January 14, 1975, as members of the Board of Regents have admitted publicly.
- 19. (a) Such policy statement was issued with the clear purpose and intent of preventing Commissioner Nyquist from proceeding with his efforts to integrate the public school systems of the five cities referred to herein, since integration plans throughout the nation have been and must be based on numerical comparisons of racial enrollment quotas.
- (b) Members of the Board of Regents have themselves recognized this purpose and intent. Chancellor McGovern has declared that the policy represents a "dilution" of the Regents' earlier support for integration; Regent Clark has similarly characterized it; Regent Genrich made it clear that a change in policy was involved with the comment, "It is his [the

Commissioner's] duty to enforce the policy of the board of Regents, and assume he will consider his orders in the light of this new mattement."

- January 30, 1975, eight days after the Regents' statement, but sixteen days after his show cause orders of January 14, 1975, Commissioner Myquist ordered all five hearings indefinitely postponed. At the very least, this will make it virtually impossible to meet Commissioner Myquist's plans for the integration to begin on S planber, 1975. The Regents have thus delayed integration by at least one year by the issuance of this policy statement.
- 21. Such indefinite postponement of orders already long overdue will aggravate the situation even further, for racial isolation in Buffalo and Lackawanna is and has been steadily increasing.
- may dismiss him at any time should he disobey their policies. Thus, any efforts by him in the future respecting proceedings in the five cities involved, as well as any other proceedings currently pending or that will be brought, are under the shadow of this "dilution" and he will be deterred from taking meaningful action to desegregate the public schools in the State of New York. Moreover, should he resign or be dismissed, his successor will be similarly deterred.
- 23. (a) By the purpose, intent and effect of the January 22, 1975 statement, the Regents have thus rescinded and implicitly rejudiated their previous policies favoring integration.
- (b) They have interfered with pending efforts to desegregate and to integrate public schools found to be segregated.
- (c) They have structured internal governmental processes in such a way as to limit the Commissioner's normal and usual plenary powers in \$310 proceedings in matters affecting race.

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(d) They have thus maintained and perpetuated segregation and racial discrimination in New York State public schools.

#### CLAIMS

- 24. The Regents, by their policy statement of January 22, 1975, have violated the Fourteenth Amendment to the Constitution of the United States and thereby violated 42 U.S.C. §1983, as follows:
- (a) by repudiating and rescinding the Regents' policies favoring integration and desegregation of the segregated schools in New York State, as described above, thereby continuing and perpetuating racial discrimination in the public schools;
- (b) by interfering with and delaying and/or preventing the expeditions resolution of desegregation proceedings currently pending before Commissioner Nyquist, thereby preventing him from ending racial discrimination in the public schools;
- (c) by deterring Commissioner Nyquist from issuing final integration orders against Buffalo, Lackawanna, and other school boards in New York

  State, thereby causing such school systems to remain segregated and thereby denying equal educational opportunity to the plaintiffs' children and other pupils enrolled therein.
- 24. The Regents, by their policy statement of January 22, 1975, have violated the Fourteenth Amendment to the Constitution of the United States because the historical content, immediate objective, and ultimate effect of the policy is to continue racial discrimination and segregation in the schools, and thus significantly encourage and involve the State in racial discrimination.

- 25. The Regents, by their policy statement of January 22, 1972, have violated the Fourteenth Amendment to the United States Constitution because they have adopted an explicitly racial classification in limiting the Commissioner's powers in desegregating schools, thereby perpetuating racial discrimination in the schools.
- 26. The Regents, by their policy statement of January 22, 1975, have violated the Fourteenth Amendment to the United States Constitution by violating New York Education Law §310 in order to interfere with and deter the Commissioner's efforts to desegregate. Under §310, the Commissioner has plenary quasi-judicial jurisdiction and powers, which may not be interfered with, once such jurisdiction has attached. The policy statement of January 22, 1975, seeks to interfere with such jurisdiction and powers in order to prevent and deter him from his efforts to desegregate and integrate the public school systems in the five above-named cities, and to continue racial discrimination therein.
  - 27. Defendants' actions injure plaintiffs irreparably.

#### RIMEDY

WHEREFORE, plaintiffs request:

- A declaration that the January 22, 1975 policy of the R ents
   is unconstitutional.
  - 2. The costs of this action.
  - 3. Reasonable attorneys' fees.
  - 4. Such other and further relief as is appropriate.

Yours, etc.,

HETCLAN SCHWARTZ, ESQ

New York Civil Liberties Union Foundation

525 O'Brian Hall

SUNYAB North Campus Amherst, N. Y. 14260

(716) 636-2091

A12

NATHANIEL JOHES, ESQ. N.A.A.C.P. 1790 Broadway New York, N. Y.

GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N. Y. 14218

DATED: February 12, 1975 Amherst, New York UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, et al.,

Plaintiffs,

NOTICE OF DEPOSITION

Civ. 75-74

JOSEPH W. McGOVERN, etc., et al.,

Defendants.

PLEASE TAKE NOTICE that plaintiffs herein will take the deposition of defendant EWALD B. NYQUIST on April 9, 1975, at 10:00 a.m. at the office of the State Education Department, Albany, New York, before a notary public authorized to take testimony.

PLEASE TAKE FURTHER NOTICE that defendant NYQUIST is required to have with him for purposes of said examination all books, records, correspondence, memoranda and other materials relating to:

- (1) The position and views of defendant NYQUIST, each individual REGENT, and the REGENTS as a body with respect to any efforts by one or more REGENTS at the June, 1974 meeting of the REGENTS to take action with respect to the REGENTS' policy relating to desegregation of the public schools in New York State.
- (2) The position and views of defendant NYQUIST, each individual REGENT, and the REGENTS as a body with respect to action taken by the REGENTS on October 25, 1974, and the policy statement of that date relating to desegregation of the public schools in New York State.
- (3) The position and views of defendant NYQUIST, each individual REGENT, and the REGENTS as a body with respect to the

show cause orders to the school boards of Buffalo, Lackawanna, Utica, Newburgh, and Mt. Vernon relating to desegregation of the public schools of those cities.

- (4) The position and views of defendant NYQUIST, each individual REGENT, and the REGENTS as a body with respect to any actions taken on January 22, 1975, including the policy statement of that date, relating to desegregation of the public schools in New York State.
- (5) The position and views of defendant NYQUIST, each individual REGENT, and the REGENTS as a body with respect to any and all actions taken on February 20, 1975, relating to desegregation of the public schools of New York State.
- (6) The position and views of defendant NYQUIST, each individual REGENT, and the REGENTS as a body with respect to any and all actions taken by the BOARD OF REGENTS at the March, 1975 meeting, relating to desegregation of the public schools of New York State.
- (7) The legislative confirmation of REGENTS JOSEPH W.

  McGOVERN, EMLYN I. GRIFFITH, WILLARD A. GENRICH, WILLIAM JOVANOVICH,
  and GENEVIEVE S. KLEIN in 1974.

Respectfully submitted,

HERMAN SCHWARTZ, ESQ.
New York Civil Liberties Union Foundation
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NATHANIEL JONES, ESQ. N.A.A.C.P. 1790 Broadway New York, N. Y.

GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N.Y. 14218

DATED: Amherst, New York March 11, 1975 UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK MARY ANDERSON, et al., NOTICE OF DEPOSITION Plaintiffs, Civ. 75-74 -vs-JOSEPH W. McGOVERN, etc., et al., Defendants. PLEASE TAKE NOTICE that plaintiffs herein will take the deposition of REGENT KENNETH B. CLARK on April 11, 1975, at 10:00 a.m. at the office of the State Education Department, Albany, New York, before a notary public authorized to take testimony. PLEASE TAKE FURTHER NOTICE that REGENT CLARK is required to have with him for purposes of said examination all books, records, correspondence, memoranda and other materials in his

(1) Action or discussions by REGENT CLARK, by the BOARD OF REGENTS as a whole, and by defendant NYQUIST in any way relating to desegregation of the New York State public schools at the REGENTS' meetings of:

(a) June, 1974

custody or control relating to:

- (b) September, 1974
- (c) January, 1975
- (d) February, 1975
- (e) March, 1975
- (2) The situation preceding and up to the policy statement of October 25, 1974.
- (3) Any agreement between defendant BOARD OF REGENTS and defendant NYQUIST to the effect that defendant NYQUIST would make

no orders calling for transportation or other pupil reassignment methods of racial desegregation.

- (4) Defendant NYQUIST's show cause orders of January 14, 1975, to Buffalo, Lackawanna, Utica, Newburgh, and Mt. Vernon.
- (5) The situation preceding and up to the policy statement of January 22, 1975 regarding desegregation.
- (6) The situation preceding and up to the February 20, 1975 clarification statement regarding desegregation of the schools.

Respectfully submitted,

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NATHANIEL JONES, ESQ. N.A.A.C.P. 1790 Broadway New York, N. Y.

GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N. Y. 14218

DATED: Amherst, New York March 11, 1975

1-12

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, et al.,

Plaintiffs,

-vs-

NOTICE OF DEPOSITION

JOSEPH W. McGOVERN, etc., et al.,

Civ. 75-74

Defendants.

PLEASE TAKE NOTICE that plaintiffs herein will take the deposition of REGENT GENEVIEVE S. KLEIN on April 14, 1975, at 10:00 a.m. at the office of the State Education Department, Albany, New York, before a notary public authorized to take testimony.

PLEASE TAKE FURTHER NOTICE that REGENT KLEIN is required to have with her for purposes of said exmination all books, records, correspondence, memoranda and other materials in her custody or control relating to:

- (1) All contacts and communications with members of the New York State legislature and others relating to REGENT KLEIN's nomination and confirmation in 1974 as a REGENT.
- (2) Action or discussions by REGENT KLEIN, by the BOARD OF REGENTS as a whole, and by defendant NYQUIST in any way relating to desegregation of the New York State public schools at the REGENTS' meetings of:
  - (a) June, 1974
  - (b) September, 1974
  - (c) January, 1975
  - (d) February, 1975
  - (e) March, 1975

(3) The situation preceding and up to the policy statement of October 25, 1974. (4) Any agreement between defendant BOARD OF REGENTS and defendant NYQUIST to the effect that defendant NYQUIST would make no orders calling for transportation or other pupil reassignment methods of racial desegregation. (5) Defendant NYQUIST's show cause orders of January 14, 1975, to Buffalo, Lackawanna, Utica, Newburgh, and Mt. Vernon. (6) The situation preceding and up to the policy statement of January 22, 1975 regarding desegregation. (7) The situation proceding and up to the February 20, 1975 clarification statement regarding desegregation of the schools. Respectfully submitted, HERMAN SCHWARTZ, ESQ. New York Civil Liberties Union Foundation 525 O'Brian Hall SUNYAB North Campus Amherst, N. Y. 14260 (716) 636-2091 NATHANIEL JONES, ESQ. N.A.A.C.P. 1790 Broadway New York, N.Y. GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N. Y. 14218 DATED: Amherst, New York March 11, 1975 A-19

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK MARY ANDERSON, et al., Plaintiffs, NOTICE OF DEPOSITION -vs-Civ. 75-74 JOSEPH W. McGOVERN, etc., et al., Defendants. PLEASE TAKE NOTICE that plaintiffs herein will take the deposition of defendant WILLARD A. GENRICH on April 15, 1975, at 10:00 a.m. at the office of the State Education Department, Albany, New York, before a notary public authorized to take testimony. PLEASE TAKE FURTHER NOTICE that defendant GENRICH is required to have with him for purposes of said examination all books, records, correspondence, memoranda and other materials in his custody or control relating to: (1) All contacts and communications with members of the New York State legislature and others relating to defendant GENRICH's nomination and confirmation in 1974 as a REGENT. (2) Action or discussions by defendant GENRICH, by the BOARD OF REGENTS as a whole, and by defendant NYQUIST in any way relating to desegregation of the New York State public schools at the REGENTS' meetings of: (a) June, 1974 (b) September, 1974 (c) January, 1975 (d) February, 1975 (e) March, 1975 A-20

-2-(3) The situation preceding and up to the policy statement of October 25, 1974. (4) Any agreement between defendant BOARD OF REGENTS and defendant NYQUIST to the effect that defendant NYQUIST would make no orders calling for transportation or other pupil reassignment methods of racial desegregation. (5) Defendant NYQUIST's show cause orders of January 14, 1975, to Buffalo, Lackawanna, Utica, Newburgh, and Mt. Vernon. (6) The situation preceding and up to the policy statement of January 22, 1975 regarding desegregation. (7) The situation preceding and up to the February 20, 1975 clarification statement regarding desegregation of the schools. Respectfully submitted, HERMAN SCHWARTZ, ESQ. New York Civil Liberties Union Foundation 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260 (716) 636-2091 NATHANIEL JONES, ESQ. N.A.A.C.P. 1790 Broadway New York, New York GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N.Y. 14218 DATED: Amherst, New York March 11, 1975

A-21

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK MARY ANDERSON, et al., Plaintiffs, -vs-NOTICE OF DEPOSITION JOSEPH W. McGOVERN, etc., et al., Civ. 75-74 Defendants. PLEASE TAKE NOTICE that plaintiffs herein will take the deposition of REGENT WILLIAM JOVANOVICH on April 16, 1975, at 10:00 a.m. at the office of the State Education Department, Albany, New York before a notary public authorized to take testimony. PLEASE TAKE FURTHER NOTICE that REGENT JOVANOVICH is required to have with him for purposes of said examination all books, records, correspondence, memoranda and other materials in his custody or control relating to: (1) All contacts and communications with members of the New York State legislature and others relating to REGENT JOVANOVICH's nomination and confirmation in 1974 as a REGENT. (2) Action or discussions by REGENT JOVANOVICH, by the BOARD OF REGENTS as a whole, and by defendant NYQUIST in any way relating to desegregation of the New York State public schools at the REGENTS' meetings of: (a) June, 1974 (b) September, 1974 (c) January, 1975 (d) February, 1975 (e) March, 1975 A-22

-2-

- (3) The situation preceding and up to the policy statement of October 25, 1974.
- (4) Any agreement between defendant BOARD OF REGENTS and defendant NYQUIST to the effect that defendant NYQUIST would make no orders calling for transportation or other pupil reassignment methods of racial desegregation.
- (5) Defendant NYQUIST's show cause orders of January 14, 1975, to Buffalo, Lackawanna, Utica, Newburgh, and Mt. Vernon.
- (6) The situation preceding and up to the policy statement of January 22, 1975 regarding desegregation.
- (7) The situation preceding and up to the February 20, 1975 clarification statement regarding desegregation of the schools.

Respectfully submitted,

HERMAN SCHWARTZ, ESQ.
New York Civil Liberties Union Foundation
525 O'Brian Hall
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NATHANIEL JONES, ESQ. N.A.A.C.P. 1790 Broadway New York, N. Y.

GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N. Y. 14218

DATED: Amherst, New York March 11, 1975 UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, et al.,

Plaintiffs,

-vs-

NOTICE OF DEPOSITION

JOSEPH W. McGOVERN, etc., et al.,

Civ. 75-74

Defendants.

PLEASE TAKE NOTICE that plaintiffs herein will take the deposition of REGENT EMLYN I. GRIFFITH on April 21, 1975, at 10:00 a.m. at the office of the State Education Department, Albany, New York, before a notary public authorized to take testimony.

PLEASE TAKE FURTHER NOTICE that REGENT GRIFFITH is required to have with him for purposes of said examination all books, records, correspondence, memoranda and other materials in his custody or control relating to:

- (1) All contacts and communications with members of the New York State legislature and others relating to REGENT GRIFFITH's nomination and confirmation in 1974 as a REGENT.
- (2) Action or discussion by REGENT GRIFFITH, by the BOARD OF REGENTS as a whole, and by defendant NYQUIST in any way relating to desegregation of the New York State public schools at the REGENTS' meetingsof:
  - (a) June, 1974
  - (b) September, 1974
  - (c) January, 1975
  - (d) February, 1975
  - (e) March, 1975

- (3) The situation preceding and up to the policy statement of October 25, 1974.
- (4) Any agreement between defendant BOARD OF REGENTS and defendant NYQUIST to the effect that defendant NYQUIST would make no orders calling for transportation or other pupil reassignment methods of racial desegregation.
- (5) Defendant NYQUIST's show cause orders of January 14, 1975, to Buffalo, Lackawanna, Utica, Newburgh, and Mt. Vernon.
- (6) The situation preceding and up to the policy statement of January 22, 1975 regarding desegregation.
- (7) The situation preceding and up to the February 20, 1975 clarification statement regarding desegregation of the schools.

Respectfully submitted,

HERMAN SCHWAL Z, ESQ.

New York Civil Liberties Union Foundation
525 O'Brian Hall
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NATHANIEL JONES, ESQ. N.A.A.C.P. 1790 Broadway New York, N. Y.

GEORGE M. HEZEL, ESQ. STUART R. COHEN, ESQ. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, N. Y. 14218

DATED: Amherst, New York March 11, 1975

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS, Plaintiffs, CIV - 75 - 74 -vs-JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

NOTICE OF MOTION
MOTION TO DISMISS
AFFIDAVIT

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

TO DISMISS COMPLAINT

NOTICE OF MOTION

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that upon the summons and complaint herein and upon the affidavit annexed to the motion, the defendants THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, JOSEPH W. McGOVERN and DR. EWALD B. NYQUIST, will move the Court pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, at a Motion Term thereof, to be held in the United States Courthouse in Buffalo, on the 31st day of March, 1975, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the action and complaint herein against the said defendants, with prejudice and with costs, and for such other and further relief as to the Court may appear just and proper, upon the following grounds:

1. That the Court lacks jurisdiction over the subject matter, in that the complaint fails to present a case or

controversy, pursuant to Clause 1 of section 2 of Article III of the United States Constitution and 28 U. S. C. 52201.

2. That the Court lacks jurisdiction over the subject

- 2. That the Court lacks jurisdiction over the subject matter in that the cause at bar is moot, the issues purported to be raised thereby having been laid to rest by events subsequent to the service of the complaint.
- 3. That the Court lacks jurisdiction over the person of defendant BOARD OF REGENTS, in that said BOARD is not a "person" within the meaning of 42 U. S. C. \$1983 and 28 U. S. C. \$1343, subdivisions 3 and 4, upon which provisions the jurisdictional claims of the plaintiffs purport to be based; and in that no jurisdictional amount under 28 U. S. C. \$1331 (a) has been or can be claimed herein; and that the defendants

  JOSEPH W. McGOVERN and WILLARD A. GENRICH are improperly named as defendants, in that they are only two members of the fifteenmember defendant BOARD OF REGENTS which adopted the statement which is the sole subject of the complaint herein; and in that the defendant DR. EWALD B. NYQUIST is not a member of said defendant BOARD OF REGENTS and could not and did not vote on the adoption of such statement.
- 4. That the complaint herein fails to state a claim upon which relief can be granted in that the complaint:
- (a) Fails to present a case or controversy of sufficient immediacy and reality as to warrant the issuance of a declaratory judgment;

- (b) Fails to present a case or controversy in that the issues purported to be raised by the complaint are now moot, having been laid to rest by subsequent events;
- (c) Fails to present a case or controversy in that no immediate injury could have possibly been caused to plaintiffs by the said statement, absent further action or failure to act by either the boards of education of Buffalo or Lackawanna, or by the Commissioner of Education;
- (d) Fails to allege any violation of the provisions of the United States Constitution.

ROBERT D. STONE

JOHN P. JEHU

Attorneys for Defendants
THE BOARD OF REGENTS OF THE STATE
OF NEW YORK, JOSEPH W. McGOVERN
and DR. EWALD B. NYQUIST

DATED: March 24, 1975

TO: HON. JOHN K. ADAMS
Clerk
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202

HERMAN SCHWARTZ, Esq. 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260

NATHANIEL JONES, Esq. N.A.A.C.P. 1790 Broadway New York, New York

GEORGE M. HEZEL, Esq. STUART R. COHEN, Esq. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, New York 14218

EDWARD L. ROBINSON, Esq. 3400 Marine Midland Center Buffalo, New York

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKI'S,

Plaintiffs,

CIV - 75 - 74

MOTION TO DISMISS COMPLAINT

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

The defendants JOSEPH W. McGOVERN, THE BOARD OF REGENTS

OF THE STATE OF NEW YORK, and DR. EWALD B. NYQUIST (Regent

WILLARD A. GENRICH being represented by separate counsel) move
the Court as follows:

- 1. To dismiss the action and complaint herein on the ground that the Court lacks jurisdiction over the subject matter, in that the complaint herein fails to present a case or controversy as required by Clause 1 of section 2 of Article III of the United States Constitution, and 28 U.S.C. §2201.
- 2. To dismiss the action and complaint herein on the ground that the Court lacks jurisdiction over the subject matter, in that the complaint herein is moot, subsequent events having put the matter to rest.

- To dismiss the action on the ground that the Court lacks jurisdiction over the person of defendant, THE BOARD OF REGENTS, which is the only defendant properly named as defendant, the said BOARD OF REGENTS having adopted the statement of January 22, 1975, which is the sole object of the attack of the complaint herein, because the defendant THE BOARD OF RECENTS OF THE STATE OF NEW YORK is not a "person" within the meaning of 42 U. S. C. §1983 and 28 U. S. C. §1343, subdivisions 3 and 4; and that the other two of said defendants, i.e., JOSEPH W. McGOVERN and DR. EWALD B. NYQUIST are improperly named as defendants, in that said JOSEPH W. McGOVERN, a member of and Chancellor of the defendant THE BOARD OF REGENTS, voted against the adoption of the statement which is the sole object of the attack of the complaint herein; and that the said DR. EWALD B. NYQUIST is not a member of the defendant THE BOARD OF REGENTS OF THE STATE OF NEW YORK, and consequently could not and did not vote on the adoption of the said statement.
- 4. To dismiss the action on the ground that the complaint herein fails to state a claim upon which relief can be granted, in that:
- (a) The complaint herein fails to present a case or controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment; and
- (b). The complaint herein fails to present a case or controversy in that it is moot, the statement under attack

having been amplified and clarified by a subsequent statement and by a motion adopted by defendant THE BOARD OF REGENTS on February 20, 1975; and

- or controversy in that it actually is directed against possible future action or failure to act on the part of the boards of education of the city school districts of the cities of Buffalo and Lackawanna, or the Commissioner of Education of the State of New York, or both, as a result of the statement here under attack, even without regard to the effect of the subsequent statement and motion adopted by defendant THE BOARD OF REGENTS on February 20, 1975, which subsequent statement and motion materially amplify and clarify the said statement of January 22; and in that the said statement of January 22, even standing by itself, could not serve as a basis for finding a case or controversy, except through a speculative effect on either the said boards of education or the Commissioner of Education or both; and
- (d) Even if all the adverse factual allegations of the complaint herein relating to the alleged questioning of certain members of the defendant THE BOARD OF REGENTS by members of the Legislature prior to the election of said Regents, and relating to the views allegedly expressed by such Regents at the time of their election, and relating to the alleged efforts of such Regents to induce the defendant THE BOARD OF REGENTS to recede from its policy favoring racial integration in the schools, and relating to the alleged

effects of such efforts, were admitted, none of such allegations suggest any breach on the part of any defendant herein of a duty imposed by any provision of the United States Constitution. To the contrary, each member of the Board of Regents, as every other person, has a constitutionally protected right to express his views and opinions. The interpretations placed by petitioners herein upon the views and actions of certain members of the defendant THE BOARD OF REGENTS, as alleged in the complaint, relate solely to means for identifying and correcting racial segregation in the schools, and not to the desirability of achieving integration. Such alleged views and actions are not inconsistent with the public policy of the Congress and the President as enunciated in the Education Amendments Act of 1974 (Public Law 93-380, 20 U. S. C. §1701, et seq.), which Act has not been held to be in violation of any provision of the United States Constitution.

- (e) The statement of January 22, 1975 is clearly addressed solely to the matter of racial integration in the public schools as a matter of educational policy, and reaffirms the policy of the defendant THE BOARD OF REGENTS that such integration is desirable. Such statement does not purport to deal in any way with constitutional requirements relating to the elimination of de jure segregation.
  - (f) The statement of January 22, except to the

extent that it reaffirms prior Regents policy as to the desirability of racial integration in the public schools, deals solely with one of the means for identifying secregated schools and for achieving integrated schools, namely, the use of quantitative measures of school population, and does not suggest that other means for detecting and correcting segregation should not be used. As a result, the statement, even without regard to the further statements of February 20, 1975, can in no way be construed or applied in such a way as to offend a constitutional right of any person; and

- (g) The statement of February 20, 1975, which amplifies and clarifies the statement of January 22, 1975, expressly states upon its face "We understand that de jure segregation is not at issue; it is unconstitutional." (emphasis supplied); and
- (h) However desirable racial integration in the public schools is as a matter of educational policy, where segregation stems solely from de facto origins, the United States Supreme Court has not held that there is a constitutional duty imposed upon public officials to bring such integration about. As a result, the statement of January 22, 1975, whether standing by itself or as amplified and clarified by the statement of February 20, 1975, cannot be found to contravene any constitutional duty imposed upon the defendants or any of them, and the finding of a substantial federal question is foreclosed by previous decisions of the United States Supreme Court.

ROBERT D. STONE

JOHN P. JEHU

Attorneys for Defendants
THE BOARD OF REGENTS OF THE STATE
OF NEW YORK, JOSEPH W. McGOVERN
and DR. EWALD B. NYQUIST

TO: HON. JOHN K. ADAMS
Clerk
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202

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EDWARD L. ROBINSON, Esq. 3400 Marine Midland Center Buffalo, New York

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS COMPLAINT

COUNTY OF ALBANY )
) ss.:
STATE OF NEW YORK)

JOHN P. JEHU, being duly sworn deposes and says:

- attorney and counselor of the United States District Court for the Western District of New York; that he is the Associate Counsel to the BOARD OF REGENTS and the Commissioner of Education of the State of New York, is associated with ROBERT D. STONE, Counsel and Deputy Commissioner for Legal Alfairs, and is familiar with the cause at bar.
- 2. That this affidavit is made in support of the notion to dismiss the action and complaint herein, made on behalf of three of the four named defendants, i.e., JOSEPH W. McGOVERN, DR. EWALD B. NYQUIST, and THE BOARD OF REGENTS OF THE STATE OF NEW YORK.

- 3. That a fourth named defendant herein, Regent WILLARD A. GENRICH, is represented by separate counsel herein, who on information and belief, will file and serve his own papers in the premises.
- 4. That the following salient facts are submitted for the consideration of the Court, the source of affiant's knowledge of which facts are the records of the defendant THE BOARD OF REGENTS:
- (a) That defendant THE BOARD OF REGENTS has, from time to time, adopted statements of educational policy on the subject of racial integration in the public schools; that such statements were adopted in 1960, 1968, 1969, 1972, October 25, 1974, January 22, 1975 and February 20, 1975; that the October, 1974 statement recites the earlier statements, which said earlier statements are therefore not returned herewith in full; that attached hereto and made a part hereof as Exhibits 1, 2, 3 and 4 are the statements of October, 1974 (Ex. 1), January, 1975 (Ex. 2) and the statement and separate motion of February, 1975 (Ex. 3 and 4).
- (b) That the statement of January 22, 1975 was adopted by a vote of nine Regents voting in favor, four Regents voting in opposition and two Regents being absent.
- (c) That Chancellor JOSEPH W. McGOVERN, named as a defendant herein, voted against the statement of January, 1975 (Fw. 2) and in favor of the February, 1975 statement

and separate motion (Ex. 3 and 4).

- (d) That defendant Commissioner of Education

  DR. EWALD B. NYQUIST, not being a member of defendant THE

  BOARD OF REGENTS, could not and did not vote on any of the

  policy statements referred to herein.
- ments here involved, the January 22, 1975 statement adopted by the BOARD OF REGENTS does not deal with and does not purport to deal with constitutional requirements relating to the elimination of de jure racial segregation, but rather, as its language clearly shows, deals with the desirability, as a matter of educational policy, of achieving racial integration in the public schools; that the January, 1975 statement declares that it is "in support and in addition to" the statement of October, 1974 (Ex. 2).
- the January statement, defendant THE BOARD OF REGENTS, on February 20, 1975 adopted a further statement of policy on the subject, and also adopted a motion specifically directed against any possible inference that the January statement was intended to interfere with the judicial power of the Commissioner of Education under Education Law §310, which said motion lays at rest any such inference (Ex. 4), and which said policy statement of the same date amplifies and clarifies the said January statement; that said statement of February 20

specifically states: "We understand that <u>de jure segregation</u> is not at issue; it is unconstitutional."

(g) That the said February statement and motion of defendant THE BOARD OF REGENTS render the complaint herein moot in that they clearly negate whatever negative inference

(h) That the February statement (Ex. 3) expressly states that the January statement was "in support and in addition to" the October statement.

plaintiffs may draw from the January statement.

- 5. That the sole relief sought by the complaint herein is that the Court find the January statement to be unconstitutional.
- the defendant THE BOARD OF REGENTS and not by any of the other named defendants herein, and that the defendants other than THE BOARD OF REGENTS are therefore improperly named as defendants; and that the action and complaint herein, as to those improperly named defendants, fails to constitute a case and controversy within the meaning of 28 U. S. C. §2201; and that it is therefore respectfully submitted that the Court has not acquired, and cannot acquire jurisdiction as to these three named defendants.

That the allegations of the complaint relating to statements allegedly made by individual members of the Legislature, or by individual members of THE BOARD OF REGENTS

are (1) entirely irrelevant, in that any pertinent action is either that of the Legislature as a whole, or of THE BOARD OF REGENTS as a whole; that (2) statements of individual members of any public body are necessarily part of the executive decision-making process which said members have a constitutional right and in fact a duty to make and (3) that none of the alleged statements, even if they were to be admitted as alleged, violate any constitutional provision, in that such alleged statements relate solely to the means for identifying and correcting racial imbalance in the schools, and not to the desirability of achieving integration.

- 7. That the Court has not acquired, and cannot acquire jurisdiction over the defendant THE BOARD OF REGENTS because said defendant is not "a person" within the meaning of 42 U. S. C. §1983, and 28 U. S. C. §1343, subdivisions 3 and 4.
- 8. That the Court lacks jurisdiction over the subject matter in that the complaint herein fails to raise a case or controversy, as required by 28 U. S. C. §2201, the parties not having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment.
- 9. That the case has been rendered moot, in any event, because subsequent events have laid the matter to rest, i.e. the adoption of two further statements by defendant THE BOARD OF REGENTS on February 20, 1975, such events having taken place subsequent to the filing and service of the complaint herein.

- 10. That the complaint herein fails to set forth a claim upon which relief can be granted for the reasons set forth in paragraphs 5 through 9 of this affidavit, which said reasons are herewith realleged and adopted for the purpose of showing insufficiency of the complaint.
- ll. That it is submitted, both for the purpose of showing lack of jurisdiction over the subject matter and showing insufficiency of the complaint, that even if all the adverse factual allegations of the complaint herein, relating both to individual members of defendant THE BOARD OF REGENTS and relating to the January statement of the said BOARD OF REGENTS, were to be admitted, the same are not inconsistent with the latest enactment of the Congress of the United States in the premises, which enactment has not been held to be in violation of the United States Constitution, i.e., 20 U. S. C. \$1701, et seq.
- 12. That the January statement, on its face, is addressed solely to the matter of racial integration in the public schools as a matter of educational policy, and not to constitutional requirements relating to the elimination of de jure racial segregation; and that therefore such statement cannot and does not contravene the Constitution of the United States, for the reason that the United States Supreme Court has never determined that a constitutionally required duty exists on the part of public officials to counteract de facto segregation in the public schools; that therefore, even if the de-

fendant THE BOARD OF REGENTS had failed and refused to take any action whatever with respect to de facto segregation, no violation of a constitutional duty could be found.

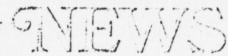
- 13. That following the adoption of the statement and motion of February 20, 1975, the defendant DR. EWALD B. NYQUIST stated publicly, on February 20, 1975, on March 21, 1975 and at other times, that following a review by himself and members of his staff of the integration plans set forth in orders to show cause previously issued by the said defendant in five integration appeals presently pending before him, including appeals involving the Buffalo and Lackawanna City School Districts, the purpose of such review being to insure consistency with all policy statements of the Board of Regents, including the statement of February 20, 1975, the said defendant will reschedule oral arguments upon the said five orders to show cause; that such public statements clearly demonstrate that the defendant DR. EWALD B. NYQUIST has not abandoned, for any reason, his intention to implement the policy of the Board of Regents that racial integration in the public schools is desirable.
- 14. That for all the foregoing reasons, the defendants herein demand that the action and complaint herein be dismissed, with costs.

JOHN P. JUHU

Sworn to before me this 27th day of March, 1975.

James H. Whitage

## NEW YORK STATE EDUCATION DEPARTMENT



Office of Peblic Information a Arnold Bloom/Director a Gerald Starer/Assistant Director Albany, New York 12224, Phone (518), 274-1201

FOR RELEASE AT 11:00 A. M., OCTOBER 25, 1974

DESEIVED

OCT 3 0 1974

SECRETARY TO THE BOARD OF REGENTS

### REGENTS ADOPT 1974 STATEMENT

#### ON INTEGRATION POLICY

The Board of Regents today adopted the following statement concerning racial integration in the schools:

-1-In 1960, the Regents unanimously adopted a statement of policy declaring that: The State of New York has long held the principle that equal educational opportunity for all children, without regard to differences in economic, national, religious, or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. All citizens therefore have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child. Since that time, the Regents have reaffirmed and expanded upon that policy and suggested means to achieve integration throughout the State's public school system. In 1968, we recommended: 1. The establishment of school attendance areas that make possible, wherever feasible, a student body that represents a cross-section of the population of the entire school district. 2. Action by school boards to develop and keep up-to-date a district plan for achieving and maintaining racially integrated schools. This plan should be developed with the assistance of a citizens' advisory committee broadly representative of the community. Appropriate and effective participation in the formation of educational policies is the right of every parent, and special effort should be made to provide opportunity for the involvement of minority-group parents in school affairs that affect their children. 3. A continuing emphasis upon racially comprehensive enrollment policies in nonpublic schools and an active effort on the part of public school authorities to bring nonpublic schools into the total community effort to eliminate racial segregation in education. A-45

- 4. Initiative by school boards in seeking cooperation and assistance of other local agencies, public and private, in the development of plans and programs for integration. Although the schools bear the major responsibility for the provision of quality integrated education for all, other community agencies dealing with welfare, housing, transportation, health, and community development or planning also have vital responsibilities which are an essential part of the effort to achieve the ultimate goal.
- 5. The exploration by school boards of the possibilities of improving racial balance in their schools through cooperative action with neighboring districts.
  - 6. The establishment and modification of school district boundaries so as to eliminate and avoid those which result in racial segregation.
  - 7. The revision and simplification of legislation authorizing school district reorganization and the substantial increase of existing financial incentives for reorganization.
  - 8. The modification of constitutional tax and debt limits on real property affecting city school districts in order to permit greater flexibility for the organization, administration, and financing of school systems which involve the city and its neighboring districts.
  - 9. Increased State appropriations to stimulate school desegregation and to help school districts finance the additional costs incurred in carrying out programs for achieving integration.
  - 10. An accelerated effort to have, in all our classrooms, textbooks and other teaching materials that reflect in their content and presentation the ethnic and cultural diversity of our world, and in particular, of American life. The curriculum should provide for all children an understanding of the contribution of the Negro, Puerto Rican, and other minority groups, and the background and nature of the present struggle for justice and equality of opportunity.

11. A broader and more intensive program of workshops for school board members and administrators, sponsored by the State Education Department, designed to promote a fuller understanding of both their local and statewide responsibilities for integration. 12. The provision throughout the State of more extensive and stronger inservice programs for teachers and administrators to increase their understanding and competence in dealing with new situations and requirements of integrated schools. 13. The broadening of the programs in our colleges and universities for the training of teachers and administrators to include preparation for the special requirements of integration. This preparation should include such experiences as student teaching, internships, seminars, and workshops involving minority-group children and In 1969, we stated: The Regents are pledged to the elimination of racial segregation in the schools as stated in our document of 1968, Integration and the Schools. We seek increased State funds for projects to correct racial imbalance, to increase compensatory education programs, and to promote the excellence of teaching necessary to realize integrated education; for services to school districts in planning and implementing desegregation projects; for the development of curricula that will enhance interracial understanding and respect; and for effecting school district reorganization to overcome segregation. We call on those having powers to eliminate discrimination and segregation in areas related to education -- housing and employment, in particular -- to use their powers, but we note that those in positions of educational leadership must not wait' for other social, business, and political forces to remedy the ills. We must take initiative to overcome the lack of understanding and respect which is at the root of those ills. Since the stability of our social order depends on the understanding and respect which derive from a common educational experience among diverse racial, social, and economic groups, A-46

that is, integrated education, we are concerned that all means be used effectively to realize integrated education. We call upon the Legislature, the Governor, and all the people of the State to make the commitments necessary to attain this goal.

In 1972, we stated:

Eighteen years ago, in the case of Brown vs. the Board of Education of Topeka, the United States Supreme Court ruled that separate (in the sense of racially segregated) schools were "inherently unequal." Until this ruling is modified or reversed, we believe that all public officials and all citizens are constrained to accept, and to implement as conscientiously as they may by whatever legitimate means are available, the spirit and the letter of the Constitution so interpreted. Anyone may disagree with the Supreme Court's interpretation of the Constitution. But to suggest that a citizen's or an official's disagreement with the Court's decision absolves him from obedience to its mandate is to cut our entire society away from what Walter Lippmann has called, "the hard-won moorings of civilization"; the rule of law.

We reaffirm the principles enunciated in the foregoing statements of policy.

In our 1972 statement we also said:.

Until residential and occupational integration becomes a reality in this nation . . . the judicious and reasonable use of motor vehicles may be in many instances the only instrument available to enable local communities to meet constitutional requirements and educational goals.

We now state, in this respect, that the judicious and reasonable transportation of pupils, where such transportation is demonstrably necessary to achieve integrated education, may be an appropriate measure for education officials to employ, subject to the considerations hereinafter stated.

Implicit in any integration policy must be the recognition of and respect for other fundamental rights of parents and children. There is



Office of Public Information & Arnold Bloom/Director & Gerald Starer/Assistant Director

Albany, New York 12234 Phone (5...) 474-1201

FOR IMMEDIATE RELEASE, JANUARY 22, 1975

## REGENTS ADOPT STATEMENT

## ON RACIAL INTEGRATION

The Regents today adopted the following statement on racial integration in the schools:

At a time when social changes in our society are both rapid and radical, it is important that public officials be sensitive and compassionate in their deliberations and decisions. The Regents are aware that in the matter of racial integration in the public schools of the State of New York there is at issue not only the development of young people but also their immediate and continuing welfare. The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origins to conduct their education together. Yet the Regents recognize that we should not, in pursuit of that principle, ignore other rational and legally justifiable views of our citizenry.

The Regents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy, that their view of integration is not based on quantitative measures of school population. Integration does not, by definition, require that racial quotas be used in determining the proper or desirable composition of population within a school. If a school district is making, and has made, a

(over)

REGENTS STATEMENT -- Page 2

serious effort to bring about equal opportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its student population, thenit should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents' statement of policy, imply quantitative racial balance in all schools within a district.

NEW YORK STATE EDUCATION DEPARTMENT



Office of Public Information Arnold Bloom/Director Gerald Starer/Assistant Director Albany, New York 12234 Phone (5-3) 474-1201

FOR RULEASE AT 11:00 A.M. THURSDAY, FEBRUARY 20, 1975

#### REGENTS ADOPT STATEMENT

### ON RACIAL INTEGRATION

The Regents today adopted the following statement on racial integration in the schools:

Our statement of January 22, 1975 clearly indicates that it is made "in support and in addition to" our statement of policy on October 25, 1974.

We understand that <u>de jure</u> segregation is not at issue: it is unconstitutional.

We also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

To determine compliance with Regents' policy on integration principally by use of quantitative measures is to use a method which by itself offers no assurance that the educational opportunity of each child is protected.

Recourse to quantitative measures is not the sole nor necessarily the principal method for determining ar I maintaining school integration or for detecting and correcting school segregation. There are other ways to measure whether or not a school district makes serious efforts to bring about integration

(over)

RACIAL INTEGRATION -- PAGE 2

of schools.

The Regents commit themselves to the following principles:

\* The Regents affirm our conviction that equal opportunity for high quality education is the right of every pupil in the public schools of this State, regardless of race, creed, or color.

\* The Regents expect every school district to take those steps necessary to enable every pupil to enjoy that primary right, and to provide appropriate appeal procedures for aggrieved pupils and parents.

\* The Regents believe that integrated schools are essential to assure that

- The Regents believe that integrated schools are essential to assure that primary right to all pupils residing in racially diverse communities. We define an integrated school as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportionate to it, and in which the programs, facilities, and equipment are not racially identifiable. What constitutes a reflection of the population of a school district will depend upon the circumstances in specific situations.
- The Regents believe that appropriate means to achieve high quality education for all pupils include, where feasible, strategic location of new schools or closing of unneeded schools or both, optional transfer programs and open enrollment, expansion of magnet and specialized schools, compensatory education programs, curriculums which enhance interracial understanding, recruitment of qualified faculty from varied racial and ethnic backgrounds, equalization of state aid to school districts, alteration of school attendance zones where necessary, and in some instances, the judicious and reasonable transportation of pupils with

(more)

RACIAL INTEGRATION -- PAGE 3

due consideration that the health, safety, and access to high quality education of pupils are not imperiled and with particular consideration that children of elementary school age are not transported for more than moderate distances.

\* The Regents believe that racial integration in public schools does not necessitate uniform proportions of pupils, by race or ethnic background, in all schools
in a district. No single factor--whether it be quality of programs or competence
of staff, or adequacy of facilities or racial or ethnic balance--is alone sufficient to
assure that the right of every pupil to high quality education in an integrated school
will be realized. The reference to "serious effort" in our statement of January 22,
1975 speaks to a combination of these factors without sole reliance on any one method
of integration or on any one measure of judging integration.



STATE OF NEW YORK: COUNTY OF ALBANY:

I, William J. Carr, Secretary, Board of Regents, do hereby certify that at the meeting of the Board of Regents on February 20, 1975 the following motion was duly made and seconded and with a quorum in attendance, was duly adopted by a majority of the Board present and voting:

I move that in the light of our discussions and in light of differences of opinion on this statement, that nothing in any of the Regents policy statements should be or can be construed or interpreted as in any way interfering or restraining the Commissioner's judicial powers in those five cases before him, and that Section 310 remain inviolate in the execution of his judicial functions to proceed forthwith in hearing these five cases.



IN WITNESS WHEREOF, I
hereunto set my hand and affix
the seal of The University and
of the State Education Department,
at the City of Albany, New York,
this 5th day of March, 1975

William J. Carr

William J. Carr Secretary, Board of Regents UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-VS-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

BRIEF

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

#### BRIEF

# IN SUPPORT OF MOTION TO DISMISS COMPLAINT

on behalf of

THE BOARD OF REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK, JOSEPH W. MCGOVERN,
CHANCELLOR OF THE BOARD OF REGENTS OF THE STATE OF
NEW YORK and DR. EWALD B. NYQUIST,
COMMISSIONER OF EDUCATION

ROBERT D. STONE

Counsel and Deputy Commissioner
for Legal Affairs

JOHN P. JEHU

Associate Counsel

Attorney for Defendants BOARD OF

REGENTS OF THE UNIVERSITY OF THE

STATE OF NEW YORK; JOSEPH W.

McGOVERN and DR. EWALD B. NYQUIST

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK: and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

#### BRIEF

## IN SUPPORT OF MOTION TO DISMISS COMPLAINT

on behalf of

THE BOARD OF REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK, JOSEPH W. McGOVERN,
CHANCELLOR OF THE BOARD OF REGENTS OF THE STATE OF
NEW YORK and DR. EWALD B. NYQUIST,
COMMISSIONER OF EDUCATION

#### Statement

The complaint herein seeks solely a declaration that a certain statement adopted by THE BOARD OF REGENTS OF THE UNI-VERSITY OF THE STATE OF NEW YORK (hereafter "Board of Regents") in January, 1975, is unconstitutional. The complaint lists as defendants:

- The said BOARD OF REGENTS, which adopted said
   January, 1975 statement by a vote of nine members in favor, four
   members opposed and two members absent.
  - 2. In their official capacities:
- (a) JOSEPH W. McGOVERN, Chancellor of the Board of Regents, who voted against the said January, 1975 statement.
- (b) DR. EWALD B. NYQUIST, Commissioner of Education, who could not and did not vote on said statement.
- (c) WILLARD A. GENRICH, who is but one of fifteen members of THE BOARD OF REGENTS and who is represented by separate counsel, filing and serving separate papers in response to the complaint herein.

The said January statement of THE BOARD OF REGENTS is correctly set forth in paragraph 17 of the complaint herein.

On February 20, 1975, however, the defendant BOARD OF REGENTS adopted another policy statement which reads as follows:

"Our statement of January 22, 1975 clearly indicates that it is made 'in support and in addition to' our statement of policy on October 25, 1974.

"We understand that <u>de jure</u> segregation is not at issue: it is unconstitutional.

"We also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

3. "To determine compliance with Regents' policy on integration principally by use of quantitative measures is to use a method which by itself offers no assurance that the educational opportunity of each child is protected. "Recourse to quantitative measures is not the sole nor necessarily the principal method for determining and maintaining school integration or for detecting and correcting school segregation. There are other ways to measure whether or not a school district makes serious efforts to bring about integration of schools. "The Regents commit themselves to the following principles: The Regents affirm our conviction that equal opportunity for high quality education is the right of every pupil in the public schools of this State, regardless of race, creed, or color. The Regents expect every school district to take those steps necessary to enable every pupil to enjoy that primary right, and to provide appropriate appeal procedures for aggrieved pupils and parents. The Regents believe that integrated schools are essential to assure that primary right to all pupils residing in racially diverse communities. We define an integrated school as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportionate to it, and in which the programs, facilities, and equipment are not racially identifiable. What constitutes a reflection of the population of a school district will depend upon the circumstances in specific situations. The Regents believe that appropriate means to achieve high quality education for all pupils include, where feasible, strategic location of new schools or closing of unneeded schools or both, optional transfer programs and open enrollment, expansion of magnet and specialized schools,

compensatory education programs, curriculums which enhance interracial understanding, recruitment of qualified faculty from varied racial and ethnic backgrounds, equalization of state aid to school districts, alteration of school attendance zones where necessary, and in some instances, the judicious and reasonable transportation of pupils with due consideration that the health, safety, and access to high quality education of pupils are not imperiled and with particular consideration that children of elementary school age are not transported for more than moderate distances.

The Regents believe that racial integration in public schools does not necessitate uniform proportions of pupils, by race or ethnic background, in all schools in a district. No single factor -- whether it be quality of programs or competence of staff, or adequacy of facilities or racial or ethnic balance -- is alone sufficient to assure that the right of every pupil to high quality education in an integrated school will be realized. The reference to "serious effort" in our statement of January 22, 1975 speaks to a combination of these factors without sole reliance on any one method of integration or on any one measure of judging integration."

On February 20, 1975, furthermore, the defendant BOARD OF REGENTS duly adopted, by majority vote, another statement, which reads as follows:

"I move that in the light of our discussions and in light of differences of opinion on this statement, that nothing in any of the Regents policy statements should be or can be construed or interpreted as in any way interfering or restraining the Commissioner's judicial powers in those five cases before him, and that Section 310 remain inviolate in the execution of his judicial functions to proceed forthwith in hearing these five cases."

5. Questions Presented Does not the Court lack jurisdiction over the subject matter herein, where: (a) The ample it herein fails to present a case or controversy since the parties hereto do not have adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment, the statement in question not paing self-executing but depending on speculative actions of others in order to cause plaintiffs any possible i jury. (b) The complaint herein has become moot by the subsequent adoption of two further policy statements by the BOARD OF REGENTS which further statements amplify and clarify the said January statement? Does not the Court lack jurisdiction over the persons of the said named defendants, where: (a) Three of said named defendants are improperly named as defendants since these three defendants, neither singly nor together, could adopt a statement for a fifteenmember public body; and where one of such defendants is not a member of such body; and where (b) The BOARD OF REGENTS, the sole defendant which actually adopted the said statement, is not a "person" within the meaning of 42 U. S. C. §1983 and 28 U. S. C. §1343, subdivisions 3 and 4, upon which provisions the complaint purports to base the Court's jurisdiction? Does not the complaint herein fail to state a claim upon which relief can be granted where: (a) The complaint fails to present a case or controversy under 28 U. S. C. §2201?

- (b) The case has become moot, since subsequent events have laid the issue to rest?
- (c) Where the allegations of the complaint, even if they were admitted, merely contend that certain members of the BOARD OF REGENTS have expressed views, and the January statement here under attack expresses a view, adopted by the Congress of the United States, as set forth in 20 U. S. C. \$1701, et seq., which said Congressional enactment has never been declared to be in violation of any provision of the United States Constitution?
- (d) Where the January statement is directed solely to the alleviation of <u>de facto</u> segregation, as distinguished from <u>de jure</u> segregation, and where the United States Supreme Court has never declar I the existence of a constitutional duty in public officials to alleviate <u>de facto</u> segregation in the public schools, but where the defendant BOARD OF REGENTS has nevertheless, in several statements of policy, including those of January 22 and February 20, 1975, consistently expressed its view that racial integration in the public schools is desirable and essential as a matter of educational policy?

### ARGUMENT

#### POINT I

### Jurisdiction.

 The complaint herein fails to present a case or controversy, because the January statement cannot be taken out of

context, is simply a statement, as distinguished from action, and relates solely to the voluntary effort of the State to eliminate de facto segregation. The statement itself, even if it had not been amplified and clarified, is not self-executing but could affect constitutional rights only if it resulted in action or failure to act on the part of the school boards of Buffalo and Lackawanna or the Commissioner of Education, or both. It would be only this secondary effect of the statement that could have in any way affected the plaintiffs' interests. Hence, the complaint herein fails to satisfy the requirements of 28 U.S.C. \$2201, there being no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U. S. 270, 273; Aetna Life Insurance Co. v. Haworth, 300 U. S. 227; Massachusetts v. Mellon, 262 U. S. 447; Sellers v. Regents of the University of California, 432 F. 2d 493, cert. den. 401 U. S 981; Golden v. Zwickler, 394 U. S. 103).

2. The complaint herein is moot, subsequent events having laid the matter to rest, in that defendant the BOARD OF REGENTS on February 20, 1975 adopted another policy statement and a motion (Ex. 3 and 4) which amplify and clarify the January statement which alone is at issue here, so that the issues, if any, presented by the complaint are no longer "live" (Powell v. McCormack, 395 U. S. 486; U. S. v. Alaska SS Co.,

253 U. S. 113, 116; Doremus v. Board of Education, 342 U. S. 429; U. S. v. Hamburg American Line, 239 U. S. 466, 475, 476; Olson v. Allen, 367 F. 2d 565; Hall v. Beals, 296 U. S. 45, 48).

3.a. The sole substantive prayer for relief is to declare unconstitutional a statement adopted by defendant BOARD OF REGENTS. All other parties named as defendants, therefore, are improperly so named, in that no individual can adopt a resolution of a fifteen-member public body. CHANCELLOR MCGOVERN, in fact, voted against the January statement and DR. NYQUIST, not being a member of the BOARD OF REGENTS, could not and did not vote on the statement at all. Hence, the only proper party defendant is the BOARD OF REGENTS.

b. The said BOARD OF REGENTS, however, is not a "person" within the meaning of 42 U. S. C. §1983, nor of 28 U. S. C. § 1343, subdivisions 3 and 4, and therefore the Court cannot acquire jurisdiction in the case at bar and the action and complaint must be dismissed for this reason alone. (Brault v. Town of Milton, \_\_\_\_F. 2d\_\_\_[Feb. 24, 1975]; City of Kenosha v. Bruno, 412 U. S. 507, 513; Monroe v. Page, 365 U. S. 167, 187-192; Sellers v. Regents of the University of California, supra; Bennett v. People of California, 406 F. 2d 36, cert. den. 394 U. S. 966; Allison v. California Adult Authority, 419 F. 2d 822; Clark v. Washington, 366 F. 2d 678.)

c. 42 U. S. C. §1983 requires that the amount in controversy must exceed \$10,000.00 (28 U. S. C. §1331 (a)) but no such

"Assignment on Neighborhood Basis Not a Denial of Equal Educational Opportunity

\$1705. "Subject to the other provisions on this part, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis."

4. Even if all the adverse factual allegations of the complaint were to be admitted, no violation of any constitutionally imposed duty is pleaded, because none of the policy statements of defendant BOARD OF REGENTS deals with de jure segregation, as expressly so stated in the February 20, 1975 statement (Ex. 3), such segregation being well-known to defendant BOARD OF RECENTS to be clearly unconstitutional. There is no constitutionally imposed duty in any state or local educational agency to take action to relieve de facto segregation in any of its educational units (Bell v. Echool City of Gary, Indiana, 324 F. 2d 209, cert. den. 377 U. S. 924; Downs v. Board of Education of Kanams City, 336 F. 2d 988, cert. den. 380 U. S. 914).

held that even in cases of <u>de jure</u> segregation, there is no constitutional requirement of any particular degree of racial balance or mixing in each school (Swann v. Charlotte-Meckles erg Board of Education, 402 U. S. 1; Bradley v. Milliken, 40 F. 30 215; rev.d. U. S. 41 LEG 26 1009). As the court for

11.

in Bradley v. Milliken, supra, "The clear impact of this language from Swann is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or class-room.'" (p. 1089). Hence, any action and statement by the BOARD OF REGENTS, including the statement of January, 1975 is over and above any constitutional requirement, and consequently, the finding of a substantial federal question is foreclosed by previous decisions of the United States Supreme Court.

5. The mere fact that plaintiffs would prefer a different and perhaps speedier solution to the problems of "adventitious" or de facto segregation than has been possible so far, in spite of many and considerable efforts by defendant BOARD OF REGENTS and the Commissioner of Education, does not give rise to any constitutional issues which the Court can adjudicate.

## CONCLUSION

For all the foregoing reasons, the said defendants demand that the action and complaint herein be dismissed with costs.

ROBERT D. STONE

Counsel and Deputy Commissioner for Logal Affairs

JOY P. JEHU Associate Counsel

Attorneys for Defendants BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; JOSEPH W MCGOVERN and DR. EWALD B. NYGUIST

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MAY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

NOTICE OF AMENDMENT TO MOTION TO DISMISS COMPLAINT

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that upon the summons and complaint herein and upon the Notices of Motion, Motions and Affidavits served and filed heretofore by the defendants herein, and upon the un-noticed Mccion and bifidavit of plaintiffs herein, relating to a Motion for Protective Order presently pending in the United States District Court for the Northern District of New York in the above-entitled cause, the defendants herein will move the Court pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, and 28 U. S. C. 1391 (b) and 28 U. S. C. 1406 (a), at the Motion Term thereof, to be held in the United States Courthouse in Buffalo, on the 21st day of April at 10 o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard, for an Order dismissing the action and complaint herein against all defendants, with prejudice and with costs, and for such other and

further relief as to the Court may appear just and proper, upon the additional ground (in addition to the grounds set forth in defendants' original Notices of Motion and Motions to Dismiss the Complaint) of improper venue, and that defendants' original motion papers are hereby amended to that effect.

ROBERT D. STONE

. 7

JOHN P. JEHI

Attorneys for Defendant THE BOARD OF REGENTS

EDWARD L. ROBINSON

Attorney for Defendant WILLARD A. GENRICH

DATED: April 9, 1975

TO: HON. JOHN K. ADAMS
Clerk
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202

HERMAN SCHWARTZ, Esq. 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260

NATHANIEL JONES, Esq. N.A.A.C.P. 1790 Broadway New York, New York GEORGE M. HEZEL, Esq. STUART R. COHEN, Esq. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, New York 14218

HON. J. R. SCULLY Clerk United States District Court Northern District of New York Federal Building Utica, New York 13503 UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

AMENDMENT TO MOTION
TO DISMISS COMPLETED

Defendants.

The defendants herein, amending the motions to dismiss the complaint herein heretofore filed by them, move the Court, in addition to the grounds heretofore set forth in the original Notice of Motion and Motions to Dismiss, as follows:

5. To dismiss the action and complaint herein on the ground of improper venue, in that 28 U. S. C. 1391 (b) requires that a non-diversity civil action be brought "only in the judicial district where all defendants reside, or in which the claim arose", and in that the only proper defendant herein, i.e., the defendant body which adopted the resolution, the constitutionality of which is the sole issue herein, is THE BOARD OF REGENTS. The provisions of 28 U. S. C. 1392 do not avail plaintiffs herein in that Regent GENRICH who does reside in the Western District is not properly a defendant herein, in that he did not adopt the resolution here under attack, the same having been adopted by the

defendant THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE

OF NEW YORK, which is a fifteen-member public body. Hence,
the only proper defendant herein is said BOARD OF REGENTS whose
principal office is in the Northern District of New York. In
addition, the claim also arose in the Northern District, since it
was in Albany, New York that the statement under attack was
adopted.

Hence, defendants submit that the action and complaint herein must be dismissed.

ROBERT D. STONE

JOHN P. JEHU

Attorneys for Defendant THE BOARD OF REGENTS

EDWARD L. ROBINSON

Attorney for Defendant

WILLARD A. GENRICH

DATED: April 9, 1975

TC: HON. JOHN K. ADAMS
Clerk
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202

HERMAN SCHWARTZ, Esq. 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260

NATHANIEL JONES, Esq. N.A.A.C.P. 1790 Broadway New York, New York GEORGE M. HEZEL, Esq. STUART R. COHEN, Esq. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, New York 14218

HON. J. R. SCULLY Clerk United States District Court Northern District of New York Federal Building Utica, New York 13503 UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

TO DISMISS

AFFIDAVIT IN SUPPORT

OF AMENDMENT TO MOTION

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

STATE OF NEW YORK ) SS.:

COUNTY OF ALBANY

JOHN P. JEHU being duly sworn deposes and says:

- 1. That he is an attorney duly admitted to practice in this Court; that he is the Associate Counsel to the BOARD OF REGENTS and that he is familiar with the cause at bar.
- 2. That this Affidavit is made in support of an amendment to the Motion to Dismiss the Complaint herein by adding the objection of improper venue to the objections heretofore made herein.
  - 3. That this Amendment to said Motion precedes:
    - (a) The service and filing of any papers by plaintiffs in answer to the motions heretofore made herein by defendant;

- (b) Any hearing or argument before any Court herein;
- (c) Any determination of the question of the jurisdiction of this Court both over the subject matter and the person of defendants, by the Court;
- (d) Service and filing of defendants' answer.
- 4. That the defendants other than THE BOARD OF REGENTS named in the Complaint herein are improperly named, in that none of them did or in fact could adopt the statement, the constitutionality of which is the sole issue herein; that one of such improperly named defendants in fact voted against the said statement; that another of such improperly named defendants voted in favor of such statement and that the third such improperly named defendant is not a member of the said BOARD and could not vote on the statement at all.
- 5. That the only properly named defendant herein is THE BOARD OF REGENTS, whose principal office or "residence" is in the Northern District of New York.
- 6. That the Court may wish to take cognizance as a matter of comity, of the requirement of State law, under which an action or proceeding brought in the State courts against THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK must be brought in Albany County Supreme Court (CPLR §506(b)).
- 7. That the "claim arose" in the Northern District also, because the statement under attack was adopted at a meeting of defendant BOARD OF REGENTS in Albany, New York.
- 8. That therefore the complaint should have been and could only be brought in the Northern District of New York, pursuant to 28 U.S. C. 1391 (b).

9. That since Regent GENRICH is not properly named as defendant but is merely a "nominal" or "formal" defendant, his residence cannot be used for the purpose of conferring jurisdiction on the United States District Court for the Western District, so that 28 U. S. C. 1392 cannot help plaintiffs.

10. That therefore the complaint herein should be dismissed in accordance with 28 U.S. C. 1391 (b) and 1406 (a).

11. That r the reasons set forth in defendants' original
Motion papers te ends of justice would not be served by transferring the matter to the Northern District, in lieu of dismissal.

12. That, however, if the Court should not agree with defendants' demand for dismissal of the complaint and action herein on any of the grounds stated herein or in the original Motion papers, the matter should than and in that event be transferred to the United States District Court for the Northern District for adjudication.

JOHN P. JEHU

Sworn to before me this /O day of April, 1975.

J. MICHAEL EADRY, Notary Public, State of New York, Albany County

Commission Expires Morch 30, 19.76

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZFLL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV -75-74

-17-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF RECENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

DEFENDANTS' BRIEF
IN SUPPORT OF AMENDMENT
TO MOTION TO DISMISS

COMPLAINT

ROBERT D. STONE Counsel and Deputy Commissioner for Legal Affairs

JOHN P. JEHU
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Attorneys for Defendants BOARD
OF REGENTS OF THE UNIVERSITY OF
THE STATE OF NEW YORK; JOSEPH W.
McGOVERN and DR. EWALD B. NYQUIST

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WILLARD A. GENRICH

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

DEFENDANTS' BRIEF
IN SUPPORT OF AMENDMENT
TO MOTION TO DISMISS

COMPLAINT

#### Statement

The complaint herein seeks to raise but a single issue, and that is an issue of law:

"Is, or is not, the January statement of educational policy, adopted by the fifteen-member BOARD OF REGENTS, unconstitutional?"

That question must be decided, if it can be reached, by what that statement says, and by nothing else.

No single person can adopt that statement, which is a resolution of a fifteen-member public body. No single member of

2.

the BOARD and certainly no non-member of the BOARD, such as the Commissioner of Education, could or did adopt it.

The complaint names three individuals as defendants, in addition to THE BOARD OF REGENTS whose <u>BOARD action</u> is the only object of the prayer for elief in the complaint. These three individuals are not, and cannot be, real parties to this action.

For that reason, Regent GENRICH, the only one of these three individuals who reside in the Western District, is improperly named as a party defendant. Since he is not a proper defendant, this action should, as a matter of law, have been brought in the Northern District, and since it was brought in the wrong judicial district, the complaint should be dismissed for that reason.

The bases for defendants' Motions to Dismiss are hereby amended by adding as an additional ground for dismissing the action and complaint herein the ground of improper venue, which additional ground is added as FOIN1 III to the brief originally submitted (in addition to POINT I--Jurisdiction and POINT II--Insufficiency).

# ARGUMENT POINT III

#### IMPROPER VENUE

28 U. S. C. 1391 (b) provides that a non-diversity civil action "may be brought only in the judicial district where all defendants reside, or in which the claim arose . . ." (a) The only defendant whose action is the subject of the complaint herein is THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. That BOARD is a Constitutional body (New York State Constitution Article V, section 4; Article XI, section 2) and its principal office is in Albany, New York, i.e., in the Northern District, where its "residence" is therefore located (28 U. S. C. 1391(c)).

> Union Guardian Trust Co. v. Detroit Trust Co., 72 F. 2d 120

United Off. & Prof. Workers v. Smiley, 75 F. Supp. 695

Galveston, H. & S.A.R.R. Co. v. Gonzales, 151 U. S. 496

The Court may wish, in this connection, to take cognizance, as a matter of comity, of the requirement of State law, under which an action or proceeding brought in the State courts against THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK must be brought in Albany County Supreme Court (Civil Practice Law and Rules §506 (b)).

- (b) The other persons named as defendants herein, i.e., Chancellor McGOVERN, Regent GENRICH and Commissioner NYQUIST, are not properly named as defendants, since none of them are individually chargeable with the corporate statement of a fifteen-member public body. Their individual residences in any judicial district other than the Northern District are therefore irrelevant for the purpose of venue (see Par. 2 below).
- (c) The statement under attack was actually adopted in Albany, New York, on January 22, 1975. That is, therefore,

where the claim arose, i.e., in the Northern District.

Jimenes v. Pierce, 315 F. Supp. 365

Philadelphia Housing Authority v. Am.
Radiator & S. S. Co., 291 F. Supp. 252

2. It is presumed that plaintiffs seek to base their bringing the complaint in the Western District on (1) the fact that they named Regent GENRICH as a defendant, (2) the fact that said Regent resides in the Western District, and that therefore plaintiffs rely on 28 U. S. C. 1392 (a).

Such reliance is, however, wholly misplaced:

"It is settled that in the federal courts regard is to be had to the real rather than to the nominal parties."

Nakken El. & Mfg. Co. v. Westinghouse, 21 F. Supp. 336

"Jurisdiction cannot be defeated by joining formal or unnecessary parties. . . . On the question of jurisdiction, an unnecessary and dispensable party will not be considered."

Salem Trust Co. v. Manuf. Fin. Co., 264 U. S. 182

"The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned as though Markley was alone named as plaintiff; and the action was properly removed to that court."

Maryland v. Baldwin, 112 U. V. 490

To paraphrase the most happily apposite language of the the Circuit Court of the Southern District of Ohio, in 1857:

Sackett's Harbor Bank v. Barry, Fed. Cas. No. 12, 204

To the same effect:

Sheppard v. Atl. St. Gas Co. of Pa., 167 F. 2d 841

Alexander v. Lancaster, 330 F. Supp. 347 (1971)

Sands v. Geller, 321 F. Supp. 558

Hence, 28 U. S. C. 1392 (a) does not support plaintiffs position herein, and the complaint should be dismissed for improper venue.

3. Lest, plaintiffs should claim that this amendment to our original Motion papers is not timely, it must be pointed that the question of venue arises only after the Court has determined that it has jurisdiction.

Vogel v. Tenneco Oil Co., 276 F. Supp. 1008

Martin v. Lain Oil & Gas Co., 36 F. Supp. 252

Gorman v. King, 316 F. Supp. 801

Arrowsmith v. U. P. I., 320 F. 2d 219

Bookout v. Beck, 354 F. 2d 823

U. S. v. Laird, 412 F. 2d 16, cert. den. 346 U. S. 918

Such amendments are proper, when made prior to any hearing and prior to the answer.

MacNeil v. Whittemore, 254 F. 2d 820

Tuscarora Nation v. Power Authority, 161 F. Supp. 702

Schnell v. Peter Ecknich & Sons, Inc., 365 U. S. 260

Cohen v. Beneficial Ind. Loan Corp., 92 F. Supp. 418

Orange Theatre Corp. v. Rayherstz

Alausement Corp., 139 F. 2d 871,
cert. den. 322 U. S. 740

For all the foregoing reasons, and pursuant to 28 U.S.C.
 1406 (a) the action and complaint herein should be dismissed.

## CONCLUSION

It is therefore respectfully submitted that for all the reasons set forth in our original Notices of Motion, Motions to Dismiss, Affidavits and briefs and for the reasons set forth in this amendment thereto, the complaint herein must be dismissed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

-vs-

Civ. 75-74

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants have submitted a wide array of challenges to plaintiffs' complaint. All, however, must be tested by the fundamental premises that "the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 5 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1357, pp. 598-604 (1969). This is especially true where important constitutional issues are raised.

Defendants argue three points allegedly relating to jurisdiction, sufficiency of the complaint, and venue; analysis shows that most of defendants' arguments relate to factual issues and the others are baseless.

## I.1. "Jurisdiction"

The first claim is that the Regents' January, 1975 statement is not self-executing, but "is simply a statement as distinguished from action" (Br. 7). But the complaint explicitly alleges that defendant Nyquist must "execute all educational policies adopted by the Board of Regents," \( \frac{13}{c} \), and that the Commissioner issued orders to start the integration of Buffalo and Niagara Falls schools, \( \frac{18-9}{t} \), that the January 22, 1975 statement was intended to prevent Dr. Nyquist from integrating the schools of Buffalo and Niagara Falls, \( \frac{1}{18-19} \), and that a deleterious effect had already taken place, \( \frac{1}{20-21} \) (It should be noted that the show cause orders have not been rescheduled for a hearing, as of April 28, 1975.)

Thus, a purpose and effect that have already harmed plaintiffs is clearly alleged and, for purposes of Rule 12(b)(6), must be taken as true. In any event, it is a factual question as to exactly what is the ultimate impact of the January, 1975 statement.

## 2. Mootness

This contention relating to the February 29, 1975 statement raises matters outside the complaint and is therefore not appropriately part of defendants' motion. In any event, the significance of that statement is very uncertain; as of April 28, 1975, the Commissioner has not rescheduled the show cause hearings, and whether he will go through with meaningful plans in face of the January 22, 1975 statement is not at all clear; indeed, the newspapers reported that some of the Regents refused to sign it because it was ambiguous. Factual developments will show, we think, that the February actions do not really undo the harm of the January, 1975 action,

but that is a matter for proof, should defendants invoke the February, 1975 statement in their Answer. Insofar as the complaint is concerned, the February, 1975 statement is irrelevant and plaintiffs believe it will continue to remain so.

## 3. Individual Defendants

defendant Genrich, have a deliberate intent to prevent meaningful integration.

See Complaint, 111. Moreover, the Regents consist of individuals, just as does any other administrative agency or board. They are thus liable to declaratory relief under 42 U.S.C. §1983 to the same extent as other public officials whose actions violate constitutional rights under 42 U.S.C. §1983.

For actions against individual members of administrative boards, see Smith v. Merrill, 81 F.2d 609 (5th Cir. 1936); Hernandez v. Noel 323 F. Supp. 779

(D. Conn. 1970); Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo. 1970), aff'd, 399 U.S. 901 (19).

As to Commissioner Nyquist, he is certainly liable insofar as he implemented the January 22, 1975 statement by indefinitely postponing hearings on the show cause orders at issue.

As to whether the Board of Regents is a "person" for purposes of 42 U.S.C. §1983, numerous actions against boards of education and Regents have been filed without difficulty. Brault v. Town of Milton, F.2d (2d Cir. Feb. 24, 1975), and Kenosha v. Bruno, 412 U.S. 507 (1973), deal with cities and municipalities, not with administrative agencies. For cases against educational boards, see Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969); Lee v. Bd. of Regents of State Colleges, 441 F.2d 1257 (7th Cir. 1971); Harkless v. Sweeney Indep. School District, 427 F.2d 319

(5th Cir. 1970); <u>James v. W. Va. Bd. of Regents</u>, 322 F. Supp. 217 (E.D. W. Va. 1971), <u>aff'd</u>, 448 F. 785 (4th Cir. 1971).

As to the \$10,000 damages issue, it is well-established that there is no jurisdictional amount requirement for actions under 42 U.S.C. §1983.

## II. Insufficiency

Plaintiffs' claim is that the Regents' actions were taken with the purpose and effect of interfering with efforts to integrate the schools. Indeed, the Commissioner's order for Buffalo (attached to the Complaint) goes further than merely citing the Buffalo schools as being imbalanced—he concludes that such imbalance results from violations of the Fourteenth Amendment. Thus, the Regents' action is interfering with efforts to remedy constitutional violations.

In any event, plaintiffs' complaint is premised on well-established principles set out in their complaint and derived directly from decisions of this Court and others in <a href="Lee v. Nyquist">Lee v. Nyquist</a>, 318 F. Supp. 710 (W.D.N.Y. 1970), <a href="aff-d">aff-d</a>, 402 U.S. 935 (1971). It is plaintiffs' contention, which will be supported fully by the facts that come out upon discovery, that defendants, particularly the four named Regents, were put on the Board to reverse and rescind Regents' policy in order to block integration, which the Regents and the Commissioner were planning. The full dimensions of this issue and adequate consideration thereof must await full factual and other development.

#### III. Venue

Fishers

In their Amendment, defendants argue that venue is improper. But the named defendant Williard A. Genrich is in the Western District of New York, and this point must therefore fail since, as noted above, he and the other members of the Board of Regents are proper parties as individuals.

Nor was Mr. Genrich sued simply for purposes of jurisdiction. He is one of the four Regents specifically named in ¶11 of the Complaint as one of those put on the Board for the express purpose of blocking racial integration of the schools, and he is further alleged to have tried to do so from the time he joined the Board. See ¶12-13, 16. Although he was not explicitly named in ¶¶12-13 and 16 of the Complaint, discovery and admissions will prove that he was in fact one of those referred to. Many cases against administrative bodies have held venue to be proper in the district in which one of the individually-named defendants resided. See, e.g., Smith v. Merrill, 81 F.2d 609 (5th Cir. 1936); Northern Indiana Public Service Co. v. Public Service Commission of Indiana et al., 1 F. Supp. 296 (N.D. Ind. 1932); Heard v. Ouachita Parish School Board, 94 F. Supp. 897 (W.D. La. 1951).

The action is thus properly in this district.

### CONCLUSION

The motion to dismiss should be denie

ectfully submitted. Rei

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DATED: Amherst, New York April 29, 1975

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

SUPPLEMENTAL BRIEF

OF DEFENDANTS

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

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Defendants.

SUPPLEMENTAL BRIEF

OF DEFENDANTS

#### Statement

This supplemental brief is submitted in order to clarify the position of defendants in relation to several points raised at the oral argument and in reply to plaintiffs' memorandum which was received on that day.

### ARGUMENT

### POINT I

## JURISDICTION OF THE COURT.

## A. No substantial Federal question is presented.

The first determination to be made by the Court is to ascertain if jurisdiction exists. That determination must rest entirely on the allegations of the complaint. Plaintiffs have the burden of alleging in their complaint the facts essential to show jurisdiction. If plaintiffs fail to make the necessary allegations, they have no standing. (McNutt v. General Motors, 298 U. S. 178, 189.) The complaint raises, as the sole issue, the constitutionality of the January statement of educational policy of defendant BOARD OF REGENTS.

There are no allegations in the complaint bearing on this issue. The allegations of the complaint deal with previous history of the REGENTS educational policy, determinations of the Commissioner of Education, with purported statements alleged to have been made by various individuals, with claimed intent and imagined purpose of various individuals. There are no allegations which would provide a basis for a conclusion that the January statement is unconstitutional, or which indicate the theory on which only two out of the thirteen REGENTS who actually voted on the January statement were named as defendants.

The reasons for the absence of such allegations is obvious in that there are no questions of fact here involved, but simply the question of the wording of the January statement.

3. The only claim left then, in relation to the defendants' contention that the complaint is moot, is the plaintiffs' contention that the January statement of the BOARD OF REGENTS has had the effect of deferring action by the Commissioner in integration cases pending before him. There is nothing in the Constitution which prescribes a specific rate of speed at which the State must proceed, either in cases of de facto segregation or in de jure situations. The affidavit of John P. Jehu, dated May 2, 1975, clearly demonstrates that the Commissioner of Education is proceeding with dispatch in the case anding before him. It is submitted that a claim relating to the speed with which proceedings are conducted does not raise a substantial Federal question. The Court lacks jurisdiction over the persons of any of В. the defendants. It appears obvious that REGENT GENRICH is not a real 1. party in interest and was named for the sole purpose of seeking jurisdiction in the Western District. The naming of a nominal defendant is not sufficient to confer jurisdiction where jurisdiction would not otherwise exist. There were nine REGENTS voting in favor a. of that statement, and yet only one of these nine REGENTS is named as a party. While it is true that a State official b. sheds his governmental immunity when he violates a constitutional provision, the issue here is not the intent or even the individual vote of single member of a A- 94

fifteen-member board. At issue is, solely, the purely legal question as to whether or not the January statement, adopted by the entire BOARD, is in violation of the Constitution. There cannot, therefore, by any finding, on this complaint, that REGENT GENRICH has shed his governmental immunity. Moreover, he did not adopt the statement. He alone could not do so. In addition, Rule 20 (a) of the Federal Rules of Civil Procedure provides that a party defendant may be joined only if there is asserted against him jointly, separately, or otherwise, any right to relief and if any question of law or fact common to all defendants will arise in the action. For the reasons indicated, plaintiffs obviously are unable to meet this requirement. Consequently, the Court cannot acquire jurisdiction based on REGENT GENRICH and his residence in the Western District.

2. a. The BOARD OF REGENTS "resides" in the Northern District and the claim, if any, arose in the Northern District, where the statement was adopted. b. The BOARD OF REGENTS is not a "person" within the meaning of 42 U.S.C. 1983, which is the only jurisdictional basis pleaded by the plaintiffs, but is "the educational arm" of the State, and the State is not a person within the meaning of that jurisdictional provision.

Zuckerman v. Appellate Division, 421 F. 2d 625

Williford v. California,
352 F. 2d 474

(Both of these cite Monroe v.
Pape, 365 U. S. 167 referred
to in our main brief.)

- 3. It follows that the Court lacks jurisdiction over the person of any named deferlant.
- 4. Transfer of the action to the Northern District, however, is foreclosed by 28 U. S. C. 1406 (a) since, as pointed out in our earlier briefs, the Court also lacks jurisdiction over the subject matter:

because the complaint does not present a case or controversy,

because the complaint raises no substantial federal question,

because the complaint is moot, the issue having been laid to rest by subsequent events.

Therefore, since the Court lacks jurisdiction over the subject matter, no transfer is possible.

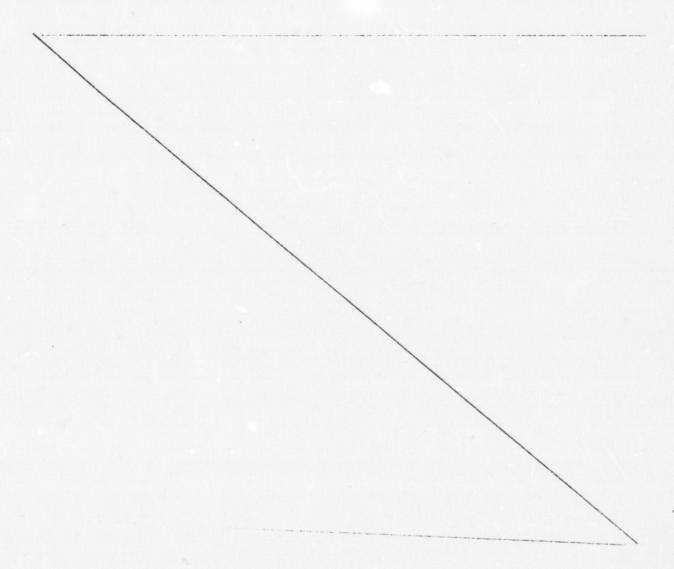
Atlantic Ship Rigging Co. v. McLellan, 288 F. 2d 589

Raese v. Kelly, 59 F. R. D. 612

Nor can the action be transferred where the Court lacks jurisdiction over the person and where the judicial district to which the action could otherwise be transferred likewise cannot acquire jurisdiction over the person.

M. Dean Kaufman, Inc. v. Warnaco, Inc., 299 F. Supp. 722

5. It is therefore submitted that the action and complaint must be dismissed.



## POINT II

# CONSTITUTIONAL REQUIREMENTS VS. EDUCATIONAL POLICY AND ARGUMENTS

A. The position and arguments of the plaintiffs in this action reflect a basic misunderstanding of the respective roles and functions of the REGENTS on the one hand and the Courts on the other, with respect to racial integration in the public schools.

They have done so in the area of racial integration, through a series of policy statements which consistently express the view that equality of educational opportunity is essential as a matter of educational policy, and that such equality cannot be achieved where racial segregation exists—however that segregation came about.

On the other hand, the REGENTS do not have the power to declare—or alter—principles of constitutional law. That is a function of the Courts. The REGENTS clearly recognize that racial segregation resulting from State action constitutes a denial of equal protection of the laws and must be corrected as a matter of law. It is not the purpose or function of their statements to elaborate that principle.

1. As the decision in <u>Lee v. Nyquist</u>, 318
F. Supp. at 712, points out, the policy statements of the REGENTS show that "the Regents . . . [are] firmly committed to a policy of eradicating <u>de facto</u> segregation in New York's public schools", referring, e.g., to the 1969 policy statement.

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2. In exercising his quantipudicial function, the Commissioner of Education is governed both by the policy statements of the BOARD OF REGENTS and by principles of law enunciated by the Courts.

While there is no conflict between REGENTS policy and judicially declared principles of law, it is clear that if such a conflict should develop at any time in the

racial integration or in any other area.

3. The January statement remains consistent with the fundamental and long-standing policy at the REGENTS concerning integration in the public schools:

future, policy would have to give way to

legal requirements whether in the area of

(a) The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origin to conduct their education together";

(b) "The Regents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy. . .";

- B. Plaintiffs seek to blur the distinction, in terms of constitutionally imposed duties, segregation resulting from government action between (de jure) and adventitious (de facto). There is no constitutionally imposed requirement that public officials take action to remedy de facto segregation. That conclusion has been expressly stated by four Circuits, i.e., the Sixth, Seventh, Tenth and our own Second Circuit (Offerman v. Nitkowski, 378 F. 2d 22). The United States Supreme Court has at least twice denied certiorari in such cases (Downs, 380 U. S. 914 and Bell, 377 U. S. 924).
- c. The January statement, as all other educational policy statements of the REGENTS, is a statement of educational policy which the Board is authorized but not required to adopt. Consequently, complete failure on the part of the REGENTS to adopt any statement on the subject of racial integration in the public schools would not violate any constitutional requirement or provision. For that reason, even if one such statement limited any other such statement in any way, no constitutional violation could exist.

#### POINT III

## LEE v. NYQUIST DISTINGUISHED

Plaintiffs seek to rely on Lee v. Nyquist, 318 F. Supp. 710, affd. 402 U. S. 935.

Such reliance is misplaced, however, since the statute invalidated therein was a radical prohibition against all efforts (except by elected boards of education) to remedy racial imbalance, whether caused de jure or by adventitious housing patterns. The statute was clearly "an explicit and invidious racial classifica-

tion" and "denies equal protection of the law."

The January statement of the REGENTS, on the other hand, relates solely to administrative educational policy matters, and neither expresses nor could result in any such prohibition.

The decision in Lee was based on a finding by the Court that plaintiffs had made a good case for the applicability of the principle of Reitman v. Mulkey, 387 U. S. 369. That decision, in turn, relied on the "historical context", "immediate objective", and "ultimate effect" of a statute which could "significantly encourage and involve the State" in racial discrimination.

The three criteria of Reitman v. Mulkey, 387 U. S. 369, however, are not met in the case at bar:

- a. The "historical context" criterion:

  The historical context in Reitman was a change which turned restrictions against impermissible action into encouragement of impermissible action. Here the desirability, and requirement, to remedy racial segregation is affirmed, and it is only some of the means of achieving the objective which are addressed.
- b. The "immediate objective" here, in contrast to Reitman, simply was to reflect educational considerations associated with the assignment and transportation of children to school.
- c. The "ultimate effect" in Reitman was found to be to increase certain types of racial discrimination in housing. Here the 'ultimate effect", at the very worst, is a short delay in

one of the steps in certain pending proceedings.

Nor is the criterion of Hunter v. Erikson,
393 U. S. 385 met. In that case, an amendment of
the Akron City Charter was involved, which added
onerous requirements for zoning enforcement proceedings if based on macial, religious or ancestral
grounds, but made no such requirements, if based on
other grounds. The amendment thus constituted a
clear racial classification. The REGENTS statement of January makes no such distinction.

It is submitted therefore that plaintiffs can derive no comfort from Lee.

#### CONCLUSION

For all the foregoing reasons defendants submit that the action and complaint herein must be dismissed.

Respectfully submitted,

ROBERT D. STONE

JOHN P. JEHU

Attorneys for Defendants State Education Department Albany, New York 12234

(518) 474-6400

EDWARD L. ROBINSON

Attorney for Defendant WILLARD A. GENRICH

3400 Marine Midland Center Buffalo, New York 14203

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, et al.,

Plaintiffs

v.

Civ-75-74

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York, et al.,

Defendants

and ORDER

CURTIN. DISTRICT JUDGE

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES. CHRISTINE JAMES, ANNIE BARNES. CHRISTINE PEYTON, FRANCINE TOLLIVER. ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS.

Plaintiffs

v.

C1v-75-74

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK: and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York.

Defendants

APPEARANCES: HERMAN SCHWARTZ, ESQ., Amherst, New York and MATHANIEL JONES, ESQ., New York, New York and GEORGE M. HEZEL, ESQ. and STUART R. COHEN, ESQ., Lackawanna, New York for the Plaintiffs.

> ROBERT D. STONE, ESQ. and JOHN P. JEHU, ESQ., Albany, New York, for Defendants Joseph W. McGovern, The Board of Regents of the State of New York and Dr. Ewald B. Nyquist.

EDWARD L. ROBINSON, ESQ., Duffalo, New York, for Defendant Willard A. Genrich

The complaint alleges an action under the Civil Rights Act, 42 U.S.C. 8 1983. The plaintiffs, residents

of the Cities of Lackawanna and Buffalo, bring this action to declare unconstitutional a policy statement of the Board of Regents of the State of New York which they allege has the purpose and effect of preventing the New York State Commissioner of Education from fulfilling his statutory and constitutional duty to desegregate the public schools of the state of New York. The plaintiffs in this case are appellants in cases pending before the Board of Pogents seeking orders directing the Cities of Lackawanna and Buffalo to end discrimination in their schools. In January 1975, orders were issued by the Commissioner, returnable in February, directing the Boards of Education of Buffalo and Lackawanna to show cause why prior plans of integration should not be implemented. On January 14th, the Commissioner issued similar orders directed to the public schools of Utica, Newburgh and Mount Vernon.

The complaint charges that in 1974, after four new Regents were appointed, they sought to induce the Board to retreat from its prior policy favoring integration of the schools. Finally, on October 25, 1974, a new statement was issued which repeated the Regent's prior policy but agreed that under certain circumstances

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parents ought to be able to employ grievance procedures if transportation would have a detrimental effect upon the health and safety of their children. After the issuance of the show cause orders in January, the Regents issued another policy statement on January 22, 1975, which reads as follows:

At a time when social changes in our society are both rapid and radical, it is important that public officials be sensitive and compassionate in their deliberations and decisions. The Regents are aware that in the natter of racial integration in the public schools of the State of New York there is at issue not only the development of young people but also their immediate and continuing welfare. The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origins to conduct their education together. Yet the Regents recognize that we should not, in pursuit of that principle, ignore other rational and legally justifiable views of our citizenry.

The Regents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy, that their view of integration is not based on quantitative measures of school population. Integration does not, by definition, require that racial quotas be used in determining the proper or desirable composition of population within a school. If a school district

is making, and has made, a serious effort to bring about equal opportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents' statement of policy, imply quantitative racial balance in all schools within a district.

The statement was adopted by a vote of nine in favor, four opposed, with two members absent. Defendant Willard A. Genrich voted in favor of the statement and Chancellor Joseph W. McGovern, against. Defendant Dr. Ewald B. Nyquist is not a member of the Board of Regents and could not, and did not, vote on the stat ment. He serves at the pleasure of the Board of Regents who may dismiss him at any time should he disobey their policies.

The complaint charges that the purpose of the statement was to prevent the Commissioner from proceeding

with efforts to integrate the public schools in the cases of the five cities in which he had issued show cause orders. It seeks a declaratory judgment that the policy statement of January 22, 1975, be held unconstitutional.

the complaint stressing a number of grounds. First, that the court lacks jurisdiction over the subject matter because the facts presented do not present a case or controversy and the issue has become most because of the adoption of two further policy statements by the Board of Regents clarifying the January statement. The defense moves to dismiss pursuant to Rule 12(b)(3) for failure of the complaint to state a claim upon which relief can be granted. Secondly, the defendants urge that the court does not have jurisdiction over the persons of the defendants, and, finally, that venue is not properly in this district.

Several affidavits have been filed in support of the motions. It appears that following the January 22d statement, the Board issued a further statement on February 20, 1975. According to the defense, the February 20th statement makes clear that

no possible inference should be made that the January statement was intended to interfere with the judicial power of the Commissioner to deal with segregation in the schools. For this reason, defendants urge the policy of the Board is in keeping with the Constitution and the decisions of the Supreme Court. Plaintiffs simply urge the fact that the statement of the Board has had the effect of preventing action by the Commissioner. The orders to show cause have not been reinstated to date.

Because the complaint alleges that the policy statement had had the effect of preventing Dr. Nyquist from integrating the schools in the Cities of Buffalo and Lackawanna, it arguably states a cause of action and a motion under Rule 12(b)(6) must be denied. The court has considered the defendants' argument that the January 22d statement of the Board does not deal with constitutional requirements as to the elimination of de jure segregation but only deals with the desirability as a matter of educational policy of achieving racial integration in the public schools. Nevertheless, in the court's view, the complaint, taken as a whole,

states a cause of action which, at this stage of the litigation, ought not to be dismissed. In addition, because the record has been supplemented by affidavits submitted by the defendants, the motion may be considered as one for summary judgment pursuant to Rule 56. But the information supplied does not afford relief to the defendants because plaintiffs maintain that the impact of the January statement continues, pointing out that the Commissioner has not reinstated the show cause orders.

The defense argument that the court does not have personal jurisdiction of the defendants is without merit. All individual defendants are residents of the State of New York. Numerous cases under 42 U.S.C.

B 1983 have been brought against school boards and boards of regents similar to the Board of Regents of the State of New York and against individual members of such boards. See Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1401 (D. Colo. 1970); Lee v. Bd. of Regents of State Colleges, 441 F.2d 1257 (7th Cir. 1971) and James v. W. Va. Ed. of Regents, 322 F. Supp. 217 (E.D. W.Va. 1971), aff'd, 443 F.2d 735 (4th Cir. 1971).

Defendants argue that venue is improper because the only defendant who resides in the Western District is Willard A. Genrich who, according to the defense, is a nominal party since he is only one member of the fifteen member Board of Regents.

Under 28 U.S.C. 3 1391(a), 12 jurisdiction is based in whole or in part on the presence of a federal question, suit must be brought in the district where all defendants reside. However, an exception to that rule exists in situations, like the instant one, where multiple defendants reside in different districts in the same state. 28 U.S.C. 8 1392(a). To avail themselves of the provisions of 3 1392(a), plaintiff's action must be any civil action, not of a local nature. "Local" has traditionally been held to refer to in rem suits. See generally 1 Moore's Federal Practice para. 0.143(2). Section 1392(a) comes into play when multiple defendants who reside in different districts of the same state are proper or necessary or indispensable parties. See 1 Moore's Federal Practice para. 0.143(1), at p. 1456. It has long been recognized that members of a public body are proper parties. See, o.g., McCardle v. Indianapolis Water Co.,

272 U.S. 400 (1926). In this case the defendant Genrich, a resident of the Western District of New York, is sued individually and by virtue of the office he holds. It is alleged that he is unlawfully threatening to perform an act which is in violation of his official duties. He is a proper party. Northern Indiana Public Service Co. v. Public Service Com<sup>9</sup>n., 1 F. Supp. 296, 298 (N.D. Ind. 1932). Venue was sustained in a prisoner civil rights suit where one defendant was a resident of the Eastern District of Wisconsin and the other a resident of the Western District of Wisconsin. Simply citing § 1392(a) the court stated that venue might be laid in either district. German v. Schmidt, 330 F. Supp. 430 (W.D. Wis. 1971).

All notions by the defendants to dismiss the complaint, urged in the original and in the amended notices, are denied.

So ordered.

Inited States District Judge

Wint. Cuto

DATED: June 9, 1975

A-11.2

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

NOTICE OF APPEAL

-VS-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

NOTICE IS HEREBY GIVEN that the BOARD OF REGENTS OF THE STATE OF NEW YORK; JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York, HEREBY APPEAL to the United States Court of Appeals for the Second Circuit, from the Order of the United States District Court for the Western District of New York, Judge John T. Curtin, entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 9th day of June, 1975, in this action, pursuant to 28 U.S.C.

ROBERT D. STONE

JOHN: P. JEHU

EDWARD L. ROBINSON

Attorneys for Defendants

DATED: June 23, 1975

A-113

TO: HON. JOHN K. ADAMS
Clerk
United States District Court
Western District of New York
604 United States Courthouse
Buffalo, New York 14202

HON. A. DANIEL FUSARO
Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

HERMAN SCHWARTZ, Esq. 525 O'Brian Hall SUNYAB North Campus Amher , New York 14260

NATHANIEL JONES, Esq. N.A.A.C.P. 1790 Broadway New York, New York 10019

GEORGE M. HEZEL, Esq. STUART R. COHEN, Esq. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, New York 14218 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

NOTICE OF MOTION FOR
PROTECTIVE ORDER
(U. S. District Court
Western Dist. of New York
CIV - 75 - 74)

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the summons and complaint and upon the notice of motion, motion to dismiss and affidavit in the above-entitled matter pending in the United States
District Court for the Western District of New York, and upon the NOTICES OF DEPOSITION in such cause, served upon two persons named as parties in the said cause and upon four other persons, i.e., members of THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK which BOARD is the principal party defendant in the said cause, said NOTICES OF DEPOSITION stating that all of said depositions will be taken in Albany, New York, beginning April 23, 1975, the defendants THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, JOSEPH W. McGOVERN, WILLIARD A. GENRICH and DR. EWALD B. NYQUIST, together with Regents

EMLYN I. GRIFFITH will move, pursuant to Rule 26, paragraph (c) of the Federal Rules of Civil Procedure, at a Motion Term to be held in the United States Post Office and Courthouse in Albany, New York, on the 21st day of April, at 10 o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard, for a PROTECTIVE ORDER providing that discovery not be had, upon the following grounds:

- 1. That the questions sought to be propounded and records and material sought by plaintiffs are wholly irrelevant to the subject matter involved in the said action and complaint pending in the United States District Court for the Western District.
- 2. That the said questions and materials govern matters which are privileged, and that such questions represent a wholly unwarranted invasion of the executive decision-making process.
- 3. That the said questions and materials would cause the parties and other persons involved, annoyance, oppression and undue burden and expense.
- 4. That there is presently pending a motion to dismiss the said action and complaint in the said cause, on the merits, which said motion is returnable on April 7 before the United States District Court for the Western District of New York, sitting in Buffalo, and that pending the determination of said motion to dismiss the action and proceeding herein, all further proceedings in relation to the taking of

said depositions should be prohibited by the Court. That the jurisdiction of the United States District Court for the Western District of New York is challenged by said motion to dismiss, on several well-founded grounds, and that the sufficiency of the omplaint is also challenged on several well-founded grounds, and that the Court should therefore not allow discovery when jurisdiction is doubtful and when the sufficiency of the complaint is

likewise subject to the most serious doubt.

ROBERT D. STONE

Counsel and Depr'y Commissioner

for Legal Affairs

JOHN P. JEHU

Associate Counsel

Attorneys for Defendants State Education Department

Albany, New York 12234

(518)474-6400

Edward R. No EDWARD L. ROBIN

Attorney for Defendant WILLARD A. GENRICH

3400 Marine Midland Center

Buffalo, New York

DATED: March 27, 1975

TO: HON. J. R. SCULLY

Clerk

United States District Court Northern District of New York

Federal Building

Utica, New York 13503

HON. JOHN K. ADAMS Clerk United States District Court Western District of New York United States Courthouse Buffalo, New York 14202

HERMAN SCHWARTZ, Esq. 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260

NATHANIEL JONES, Esq. N.A.A.C.P. 1790 Broadway New York, New York

GEORGE M. HEZEL, Esq. STUART R. COHEN, Esq. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, New York 14218 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. I.WALD B. NYQUIST, Commissioner of Education of the State of New York,

MOTION FOR PROTECTIVE ORDER

(U.S. District Court Western Dist. of N.Y. CIV - 75 - 74)

Defendants.

Upon the summons and complaint, the Notice of Motion, Motion to Dismiss and Affidavit in the above-entitled matter pending in the United States District Court for the Western District of New York, and upon the NOTICES OF DEPOSITION in such cause, served upon two persons named as parties in the said cause and upon four other persons, i.e., members of THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK which BOARD is the principal party defendant in the said cause, said NOTICES OF DEPOSITION stating that all of said DEPOSITIONS will be taken in Albany, New York, and proposed to begin April 23, 1975, and also the Affidavit attached hereto and made a part hereof, the defendants herein together with Regents KENNETH B. CLARK, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH and EMLYN I. GRIFFITH, move the Court, pursuant to Rule 26, paragraph (c) of the Federal Rules of Civil Procedure for a

PROTECTIVE ORDER prohibiting discovery, upon the following grounds:

- 1. That the questions sought to be propounded and records and material sought by plaintiffs are wholly irrelevant to the subject matter involved in the said action and complaint pending in the United States District Court for the Western District, in that the sole issue herein is the question of constitutionality of an educational policy statement adopted by THE BOARD OF REGENTS in January, 1975 and that therefore no questions of fact arise, the said document being before the Court and speaking for itself.
- 2. That the said questions and materials sought to be propounded and sought by plaintiffs concern matters which are privileged, in that such questions represent a wholly unwarranted invasion of the executive decision-making process.
- 3. That the examination and materials sought by plaintiffs herein would cause the parties and other persons involved, annoyance, harrassment, oppression and undue burden and expense.
- 4. That there is presently pending a motion to dismiss the said action and complaint in the said cause, which said motion is returnable on April 7 in Buffalo and that, pending the determination of said motion to dismiss the action and proceeding herein, all further proceedings in relation to the taking of said depositions should be prohibited by the Court.
- 5. That the jurisdiction of the United States
  District Court for the Western District of New York is challenged

by said motion to dismiss on several well-founded grounds and that the sufficiency of the complaint is also challenged on several well-founded grounds and that the Court should therefore not allow discovery when jurisdiction is very doubtful or not existing, and when the sufficiency of the complaint is likewise subject to the most serious doubt. ROBERT D. STONE Counsel and Deputy Commissioner for Legal Affairs JOHN P. JEHU Associate Counsel Attorneys for Defendant State Education Department Albany, New York 12234 (518) 474-6400 EDWARD L. ROBINSON Attorney for Defendant WILLARD A. GENRICH 3400 Marine Midland Center Buffalo, New York DATED: March 27, 1975 TO: HON. J. R. SCULLY Clerk United States District Court Northern District of New York Federal Building Utica, New York HON. JOHN K. ADAMS Clerk United States District Court Western District of New York United States Courthouse Buffalo, New York 14202 -3-9-121

HERMAN SCHWARTZ, Esq. 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260

NATHANIEL JONES, Esq. N.A.A.C.P. 1790 Broadway New York, New York

GEORGE M. HEZEL, Esq. STUART R. COHEN, Esq. Legal Aid Bureau of Buffalo 281 Ridge Road Lackawanna, New York 14218 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE
JAMES, ANNIE BARNES, CHRISTINE PEYTON,
FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD,
YVONNE HENLEY, ANN SCRUGGS, BLANCHE
THOMAS and EVELYN PERKINS,

Plaintiffs,

-VS-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

AFFIDAVIT IN SUPPORT
OF MOTION FOR
PROTECTIVE ORDER
(U.S. Dist. Court
Western Dist. of N.Y.
CIV - 75 - 74)

STATE OF NEW YORK )

COUNTY OF ALBANY )

JOHN P. JEHU being duly sworn deposes and says:

- as an attorney and counselor, solicitor, advocate and proctor of the United States District Court for the Northern District of New York, is associated with ROBERT D. STONE, Counsel and Deputy Commissioner of Education for Legal Affairs, and is familiar with the cause at bar.
- 2. That this Affidavit is made in support of the defendants' motion for a PROTECTIVE ORDER, prohibiting the taking of depositions of the Commissioner of Education and five members of THE BOARD OF REGENTS in the above-entitled matter.

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- 3. That the sole relief sought by the complaint herein is a declaration by the United States District Court for the Western District of New York that a certain statement of educational policy adopted by defendant THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK on January 22, 1975, is unconstitutional.
- 4. That the complaint herein contains various allegations relating to remarks allegedly made and views allegedly exchanged among various individual members of THE BOARD OF REGENTS, between such members and individual members of the State Legislature, and among individual members of THE BOARD OF REGENTS and the Commissioner of Education.
- 5. That all such alleged remarks, statements and views are entirely irrelevant to the sole issue herein, i.e., whether or not the January 22, 1975 educational policy statement adopted by THE BOARD OF REGENTS is constitutional; that such statement speaks for itself and must be judged solely on the basis of its content.
- 6. That the January 22 statement could not be, and was not, adopted by any single member of THE BOARD OF REGENTS but was necessarily adopted by the entire BOARD OF REGENTS, the vote having been nine members in favor, four members opposed and two members absent; that the election of individual members of THE BOARD OF REGENTS is not accomplished by individual legislators, but by the entire State Legislature.

- 7. That as a result, any statements made by individual legislators and by individual members of THE BOARD OF REGENTS are wholly irrelevant to the determination of the sole issue herein, i.e., whether or not the January 22 statement of THE BOARD OF REGENTS is unconstitutional.
- 8. That THE BOARD OF REGENTS, since the filing and service of the complaint herein and on February 20, 1975, adopted two further statements of educational policy concerning racial integration in the public schools, which further statements render the complaint herein moot, in that the later statements amplify and clarify the January 22 statement so as to clearly negate the inferences plaintiffs seek to draw improperly from the January statement.
- 9. That the statement of January 22, 1975 is clearly addressed solely to the matter of racial integration in the public schools as a matter of educational policy, and reaffirms the policy of the defendant THE BOARD OF REGENTS that such integration is desirable; that such statement does not purport to deal in any way with constitutional requirements relating to the elimination of de jure segregation; that the statement of January 22, except to the extent that it reaffirms prior Regents policy as to the desirability of racial integration in the public schools, deals solely with one of the means for identifying segregated schools and for achieving integrated schools, namely, the use of quantitative measures of school population, and does not suggest that other means for detecting and correcting segregation should not be used; that as a result,

the statement, even without regard to the further statements of February 20, 1975, can in no way be construed or applied in such a way as to offend a constitutional right of any person; and that the statement of February 20, 1975, which amplifies and clarifies the statement of January 22, 1975, expressly states upon its face "We understand that de jure segregation is not at issue; it is unconstitutional." (Emphasis supplied.)

10. That the Commissioner of Education, both immediately after the February meeting of THE BOARD OF REGENTS, and again after the March meeting of THE BOARD OF REGENTS and at other times, publicly stated that he will proceed with five appears presently pending before him and involving racial segregation in the public schools of Buffalo, Lackawanna and three other city school districts, and that, after a review by himself and his staff of the integration plans set forth in certain orders to show cause previously issued by him in those appeals, for the purpose of insuring consistency of all such plans with all policy statements of THE BOARD OF REGENTS, including the February statements, he will reschedule oral argument upon each of the said five orders to show cause; that such public statements clearly demonstrate that the defendant DR. EWALD B. NYQUIST has not abandoned, for any reason, his intention to implement the expressed policy of THE BOARD OF

REGENTS that racial integration in the public schools is desirable; that all of this clearly shows that the complaint herein is moot.

- relate to "positions and views" and "actions or discussions" by individual members of THE BOARD OF REGENTS, "contacts and communications" between individual members of THE BOARD OF REGENTS and individual members of the State Legislature; that any such individual positions, views, communications and discussions, apart from being entirely irrelevant to the issue in this case, are part of the executive decision-making process, can only be expressions of individual views and opinions which all such individuals have a constitutional right and a statutory duty to express, and are therefore privileged as being in the nature of intra-governmental opinions, recommendations, advice and deliberations comprising part of the process by which governmental decisions and policies are formulated, and are therefore immune from discovery proceedings.
- BOARD OF REGENTS adopted on January 22, 1975 that is at issue in this action, that such statement is correctly set forth in paragraph 7 of the complaint, and that a copy thereof is also attached to defendants' Affidavit in Support of the Motion to Dismiss the Complaint; that the educational policy statements of THE BOARD OF REGENTS, adopted in October, 1974 and January and February, 1975 are all public documents, freely available

and widely disseminated, and are directly before the Court; and that no discovery proceeding is needed to produce them; that the five show cause orders of the Commissioner of Education are likewise before the Court, having been attached to the complaint herein by plaintiffs in full.

- 13. That therefore all documentary evidence needed for the consideration of the sole issue of the complaint, i.e., the question of constitutionality of the January statement, is actually before the Court.
- 14. That members of THE BOARD OF REGENTS receive no salary for their extensive and time-corsuming services; that their duties require them to travel to Albany at least once in each of eleven months of each year, where they spend at least three days each month; that prior to and during each such meeting, they review large and ever increasing volumes of materials; that to require them to make additional trips from distant places for wholly irrelevant purposes clearly constitutes harrassment, annoyance, and an undue burden and expense and an interruption of their professional and occupational work, at great loss in time, effort and money.
- 15. That there are over 750 school districts in this State, as well as large numbers of institutions of higher learning and large numbers of professional practitioners in the various professions, which may be affected in one way or another by various actions taken by THE BOARD OF REGENTS; that

there are five school districts presently directly involved in the pending appeals to the Commissioner referred to above and involving racial integration in the public schools; that if individual members of THE BOARD OF REGENTS can be subjected to discovery proceedings in each matter which involves policies promulgated by them, the functioning of THE BOARD OF REGENTS will become impossible.

- 16. That the authorization of such discovery proceedings would have a chilling effect on the constitutional rights of all members of THE BOARD OF REGENTS to express themselves freely, during meetings of the Board and otherwise, on all matters of educational policy as their individual judgments and opinions dictate.
- 17. That as indicated in our motion papers submitted in the Western District, copies of which are submitted herewith, the January 22, 1975 statement is not concerned with de jure segregation and therefore, in view of the previous decisions of the United States Supreme Court in the premises, the complaint herein fails to present a substantial federal question, apart from being mooted by subsequent events.
- 18. That it is the position of the defendants herein that the United States District Court for the Western District lacks jurisdiction in this matter and that in any event, the complaint herein fails to set forth a claim upon which relief can be granted.
- 19. That a motion to dismiss the action and complaint herein has been made by defendants in the United States

District Court for the Western District of New York returnable on April 7, 1975 and that in view of the pendency of a decision on said motion no deposition should be authorized to be taken.

20. That for all the foregoing reasons it is urgently submitted that the Court should issue a PROTECTIVE ORDER herein prohibiting the taking of depositions as demanded by plaintiffs in their notices of depositions dated March 11, 1975 and notices for April 9 through April 21, 1975 as adjourned to April 23 through May 5, 1975.

убни Р. ЈЕНО

Sworn to before me this

27day of March, 1975.

S. MICHAEL PAGET NO TO DINE

State of W w / 2 Al. . / County

Commission Dagless star h 30, 1976

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNLS, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-VS-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

### BRIEF

## IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

on behalf of

THE BOARD OF REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK, JOSEPH W. McGOVERN,
CHANCELLOR OF THE BOARD OF REGENTS OF THE STATE OF
NEW YORK, DR. EWALD B. NYQUIST, COMMISSIONER OF EDUCATION,
and REGENTS KENNETH B. CLARK, GENEVIEVE S. KLEIN,
WILLARD A. GENRICH, WILLIAM JOVANOVICH and EMLYN I. GRIFFITH

ROBERT D. STONE
Counsel and Deputy Commissioner
for Legal Affairs
JOHN P. JEHU
Associate Counsel
Attorneys for Defendants
State Education Department
Albany, New York 12234
(518)474-6400

EDWARD L. ROBINSON
Attorney for Defendant
WILLARD A. GENRICH
3400 Marine Midland Center
Buffalo, New York

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs,

CIV - 75 - 74

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants.

### BRIEF

## IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

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OF THE STATE OF NEW YORK, JOSEPH W. McGOVERN,
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and REGENTS KENNETH B. CLARK, GENEVIEVE S. KLEIN,
WILLARD A. GENRICH, WILLIAM JOVANOVICH and EMLYN I. GRIFFITH

### Statement

The complaint herein seeks solely a declaration of the United States District Court for the Western District of New York, that a certain educational policy statement adopted by HE BOARD OF REGENTS, and relating to correction of racial secondation in the public schools as a matter of educational policy is unconstitutional.

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That statement is before the Court, being quoted in full in the complaint.

Defendants have moved to dismiss the complaint, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, for lack of jurisdiction and insufficiency, in that the complaint fails to present a case or controversy; in that subsequently adopted statements of THE BOARD OF REGENTS have rendered the complaint moot; in that THE BOARD OF REGENTS is not a "person" within the meaning of 42 U. S. C. §1983 and §1343 upon which plaintiffs purport to rely and in that the other named defendants are improperly named, and in that the complaint fails to raise a substantial federal question.

Plaintiffs have served six Notices of Deposition, for the Commissioner of Education, and five members of THE BOARD OF REGENTS, all returnable in Albany, from April 9 - April 24, which dates have been extended, by agreement, to April 23 - May 5, 1975.

Such deposition notices seek to discover "positions and views", "actions or discussions" by <u>individual</u> members of THE BOARD OF REGENTS, and "contacts and communications" between <u>individual</u> members of THE BOARD OF REGENTS and <u>individual</u> members of the State Legislature.

Since Rule 26, paragraph (c) of the Federal Rules of Civil Procedure specifically authorizes parties to seek protective orders in the District where the depositions are to be taken, defendants are seeking such an Order in this Court.

#### ARGUMENT

#### POINT I

A PROTECTIVE ORDER IS NECESSARY PENDING A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK ON DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR LACK OF JURISDICTION AND FOR INSUFFICIENCY.

As indicated above, a Motion to Dismiss the Complaint is now pending decision in the United States District Court for the Western District of New York.

If the Motion to Dismiss is granted, then the taking of depositions, prior to such decision, would be an unnecessary and unjustifiable waste of time, effort and money on the part of the public officials whose depositions are sought.

Even if the Motion to Dismiss is not granted, the testimony and documents sought by the plaintiffs are irrelevant to a determination of the sole issue before the Court in this action, i.e., whether the January 22 statement is unconstitutional.

It is therefore submitted that a Protective Order should be granted for this reason.

### POINT II

A PROTECTIVE ORDER IS NECESSARY TO SECURE THE INTEGRITY OF THE INTRA-GOVERNMENTAL DECISION AND POLICY-MAKING PROCESS OF THE BOARD OF REGENTS.

Plaintiffs seek the disclosure of statements, conversations and materials which are covered by executive privilege.

In speaking of executive privilege, the Courts have stated as follows:

"While it is agreed that the privilege extends to all military and diplomatic secrets, its recognition is not confined to data qualifying as such. Whatever its boundaries as to other types of claims not involving state secrets, it is well established that the privilege obtains with respect to intra-governmental documents reflecting opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (Emphasis supplied.)

Such executive privilege:

"... subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate.

"Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision and policy-making process.

"The rule immunizing intragovernmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor, . . . expressions assisting the reaching of a decision are part of the decision-making process."

Carl Zeiss Stiftung, et al. v. V. E. B. Carl Zeiss, et al., 40 F. R. D. 318; affd. 384 F. 2d 979; cert. den. 389 U. S. 952.

To the same effect:

Mackin v. Zuckert, 316 F. 2d 336; cert. den. 375 U. S. 896.

Boeing Airplane Co. v. Coggeshall, 280 F. 2d 654.

Clark v. Pearson, 238 F. Supp. 495.

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Zacker v. U. S., 227 F. 2d 219; cert. den. 350 U. S. 993.

Kaiser Aluminum & Chem. Co. v. U. S., 157 F. Supp. 939.

Walled Lake Door Co. v. U. S., 31 F. R. D. 258.

E. W. Bliss Co. v. U. S., 203 F. Supp. 175.

O'Keefe v. Boeing Co., 38 F. R. D.

North American Airlines v. Civil Aeron. Bd., 240 F. 2d 867; cert. den. 353 U. S. 941.

U. S. v. Morgan, 313 U. S. 409, 422.

Thill Sec. Corp. v. N. Y. Stock Exchange, 57 F. R. D. 133.

Likewise, in Committee for Nuclear Responsibility v. Seaborg, 463 F. 2d 788, the Court stated that statements and conversations such as are involved in plaintiffs disclosure proceedings, are:

"... comments that must be held confidential, in order to protect the integrity of the executive decision-making process."

To the same effect:

Cates v. LTV Aerospace Corp., 480 F. 2d 620.

In the Committee for Nuclear Responsibility case, after referring to the need for security in military and diplomatic matters, the Court stated that quite beyond such matters:

"... government may still have an interest, however, in avoiding disclosure of documents which reflect intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the

6. effectiveness of government decision-making processes." In Committee for Nuclear Responsibility, the Court pointed out that it is the settled rule that the Court must balance the moving parties' need for information against the reasons which are asserted against disclosure. At this point the Court continued: ". . . this balancing process will require an excision . . . of

material which consists purely of advice, deliberations and recommendations."

These remarks become doubly important in view of the fact that, as pointed out in the following Point, the information sought by plaintiffs herein is entirely irrelevant to the determination of the sole issue herein, i.e., whether or not a certain statement which is before the Court does or does not violate the Constitution.

### POINT III

A PROTECTIVE ORDER IS REQUIRED BY LAW SINCE THE INFORMATION SOUGHT IS WHOLLY IRRELEVANT TO THE DETERMINATION OF THE SOLE NON-FACTUAL ISSUE HEREIN.

As the Court pointed out in Mitchell v. Roma, 265 F. 2d 633, at 636:

> "Thus the question is narrowed down to whether the disclosure sought . . . is essential to assure a fair determination of the issues."

In this connection the paramount consideration is the fact that the sole issue herein is the question whether or not

the educational policy statement adopted by THE BOARD OF REGENTS on January 22, 1975 is unconstitutional. This is purely a matter of law and the statement must be judged by its own wording.

For the determination of this issue of law, it is entirely immaterial what an individual legislator may have said to a person being considered for election as a Regent, and what such person may have answered.

The January 22, 1975 statement of THE BOARD OF REGENTS was not adopted by any single member of THE BOARD OF REGENTS, but by the entire BOARD, i.e., by a vote of nine members in favor, four members opposed and two members absent.

The sole issue being a question of law, i.e., whether or not the statement in question violates the United States

Constitution, it is wholly immaterial how THE BOARD OF REGENTS arrived at the adoption of this statement. It is obviously the product of deliberations, studies, and conversations by the individual members of the BOARD, leading to the final adoption of the January statement.

The irrelevance of the information and materials sought by plaintiffs is further demonstrated by the adoption of two further educational poly statements of THE BOARD OF REGENTS on February 20, 1975, which statements point out that the January statement (1) included an affirmation by the REGENTS of the desirability of racial integration in the public schools as a

matter of educational policy; (2) that <u>de jure</u> segregation was not involved in any way in any of these statements, the REGENTS being fully aware of its unconstitutionality; and (3) that none of the educational policy statements of THE BOARD OF REGENTS were meant to interfere with the judicial powers of the Commissioner of Education in carrying out his duties under the law.

As the Court pointed out in <u>Hesselbine</u> v. <u>von Wedel</u>,

44 F. R. D. 431, where information sought, under Rule 26 of
the Federal Rules of Civil Procedure, paragraph (b) is not:

"relevant to the subject matter involved in the pending action," objection must prevail, and "opinions, conclusions or legal matters" may not be required to be disclosed.

In sum, if the statement is unconstitutional, it makes no difference that statements by individuals prior to the adoption of such statement may be in error, or may reflect pure wisdom or the most cogent legal reasoning. Likewise, if the statement is constitutional, the ways in which individual members of THE BOARD OF REGENTS reached their individual conclusions leading to such ultimate adoption are of no consequence.

As the Court said in Zeiss, supra:

"The Judiciary, the courts declare, is not authorized 'to probe the mental processes' of an executive or administrative officer. [citing Morgan v. U. S., supra.] This salutary rule forecloses investigation into the methods by which a decision is reached . . . " (40 F. R. D. 325 and 313 U. S. 422)."

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need to protect and respect "the integrity of the administrative process" (40 F. R. D. 326), as it is on the requirement of Rule 26 that the subject matter must be relevant to the issues involved in the pending action, in order to be open to disclosure. Whether or not the collective result of the mental processes of each individual member of THE BOARD OF REGENTS, in formulating his individual decision on how to vote, is a document which successfully withstands constitutional attack, such mental processes are utterly irrelevant to a determination of the constitutionality of the result of the process.

It is therefore submitted that a Protective Order must be issued herein on this ground as well.

### POINT IV

A PROTECTIVE ORDER IS REQUIRED TO SAVE THE MEMBERS OF THE BOARD OF REGENTS AND THE COMMISSIONER OF EDUCATION FROM UNJUSTIFIABLE AND NEEDLESS HARRASSMENT, ANNOYANCE AND UN-DUE BURDEN AND EXPENSE.

The members of THE BOARD OF REGENTS receive no salary for their extensive and time-consuming services. They are responsible for formulating policy for the entire range of educational and professional matters within their jurisdiction, including the elementary and secondary school system in over 750 school districts, only five of which are involved in the present

controversy, 46 Boards of Cooperative Educational Services; hundreds of institutions of post secondary grade; thousands of professional practitioners in 23 professions; and such additional areas as museums, libraries, external degrees, educational television, and the incorporation of educational institutions.

The duties of the REGENTS require them to travel to Albany at least once in each of eleven months of each year, where they spend at least three days each month; to attend numerous other meetings and conferences each year; and to review large and ever increasing volumes of materials relating to such meetings.

To require individual members of THE BOARD OF REGENTS to make additional trips from distant places for wholly irrelevant purposes, such as those involved here, clearly constitutes harrassment, annoyance and undue burden and expense and an interruption of their professional and occupational work, at great loss in time, effort and money.

It is submitted that the Court should protect the members of THE BOARD OF REGENTS from such improper, irrelevant, useless and unjustifiable harrassment.

The Office of Counsel to THE BOARD OF REGENTS and the Commissioner of Education has presently pending over 70 litigated matters many of which involve, directly or indirectly, policies adopted by THE BOARD OF REGENTS or determinations of the Commissioner of Education. If disclosure proceedings involving members of THE BOARD OF REGENTS and the Commissioner of

Education were to be authorized in such matters with respect to the process of policy formulation, the educational functions of these State officers would be seriously hampered, if not made impossible.

It is urgently submitted that the Court should issue a Protective Order herein to prevent the unjustifiable harrassment of members of THE BOARD OF REGENTS and the Commissioner of Education.

## POINT V

A PROTECTIVE ORDER IS REQUIRED WHERE THE JURISDICTION OF THE COURT IS DOUBTFUL.

As the Court pointed out in Cannon v. United Insurance Co. of America, 352 F. Supp. 1212:

". . . this Court should not order . . . discovery when jurisdiction is doubtful."

As indicated, there is presently pending a Motion on the part of defendant to dismiss the complaint herein for lack of jurisdiction in the Court, in that the complaint fails to present a case or controversy; in that the cause at bar is moot; in that the Second Circuit has recently held that the only proper defendant in this litigation, i.e., THE BOARD OF REGENTS, is not a "person" within the meaning of the United States Code provisions upon which plaintiffs purport to rely (Brault v. Town of Milton, \_\_\_F. 2d \_\_\_[Feb. 24, 1975]); and in that the other defendants have been impreserly named. In addition, the Motion to Dismiss is also based on failure of the complaint to state a

claim upon which relief can be granted.

Under such circumstances, and especially when the jurisdiction of the Court in which the complaint is pending is doubtful, a Protective Order is clearly required to prevent needless and unjustifiable discovery proceedings.

#### CONCLUSION

For all the foregoing reasons it is urgently requested that the Court issue a Protective Order prohibiting the taking of the depositions and the production of the materials demanded by plaintiffs.

Respectfully submitted,

ROBERT D. STONE

Counsel and Deputy Commissioner

for Legal Affairs

JOHN P. JEHU

Associate Counsel

Attorneys for Defendants State Education Department

Albany, New York 12234

(518) 474-6400

EDWARD L. ROBINSON

Attorney for Defendant

WILLARD A. GENRICH

3400 Marine Midland Center

Buffalo, New York

ASSOCIATE COUNSEL

April 1, 1975

Hon. John K. Adams Clerk United States District Court Western District of New York United States Courthouse Buffalo, New York 14202

Dear Mr. Adams:

Re: Anderson, et al. v. McGovern, et al. CIV - 75 - 74

Enclosed herewith please find Notice of Motion for Protective Order, returnable in the United States District Court for the Northern District of New York, in Albany, on April 21.

It is presumed that the papers herein, Notice of Motion, Motion, Affidavit and brief need to be filed in your office as well as in the Office of the Clerk of the United States District Court for the Northern District, to which it is being sent by even mail.

Sincerely,

John P. Jehu

Enclosures

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THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12234

ASSOCIATE COUNSEL

April 1, 1975

Hon. J. R. Scully Clerk United States District Court Northern District of New York Federal Building Utica, New York

Dear Mr. Scully:

Re: Anderson, et al. v. McGovern, et al. CIV - 75 - 74

Enclosed herewith please find Notice of Motion for Protective Order, Motion and Affidavit and brief in the above-entitled matter, which is noticed for April 21, in Albany, for filing.

Sincerely

John P. Jehu

Enclosures

ASSOCIATE COUNSEL

April 1, 1975

Herman Schwartz, Esq. 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260

Dear Mr. Schwartz:

Re: Anderson, et al. v. McGovern, et al. CIV - 75 - 74

Enclosed herewith please find Notice of Motion,

Motion, Affidavit and brief relating to our Motion for

Protective Order, returnable in Albany, New York on April 21.

John P. Jehu

Enclosures

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S.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY, NEW YORK 12234

Associate counsel

April 1, 1975

Edward L. Robinson, Esq. 3400 Marine Midland Center Buffalo, New York

Dear Mr. Robinson:

Re: Anderson, et al. v. McGovern, et al. CIV - 75 - 74

Enclosed herewith please find a copy of our papers in the above-entitled matter.

According to your authorization I have signed your name to the Notice of Motion, Motion and brief.

Sincerely,

John P. Jehu

Enclosures

A-109

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS, Plaintiffs, Misc. 39 -vs-(Civ. 75-74, W.D.N.Y.) JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York, Defendants. MEMORANDUM IN OPPOSITION TO MOTION FOR A PROTECTIVE ORDER 1. The Motion Should Be Transferred To The Western District of New York. For the reasons set forth in the attached affidavit submitted to the United States District Court for the Western District of New York in connection with the argument on defendants' motion to dismiss, plaintiffs urge that this Court transfer this motion for a protective order to the United States District Court for the Western District of New York, where the action is pending. Put briefly, plaintiffs' argument is that judicial convenience and economy militate against piecemeal and geographically fragmented disposition of key issues in this case, especially since, as the affidavit shows, defendants' motion requires detailed acquaintance and careful analysis of the substantive issues in the case. A- 150

The permission to bring a motion for a protective order in the justified deponent's home district, granted by Rule 26(c), is/only where that district is far from the trial venue and it would be unduly burdensome to litigate the protective order issue elsewhere. Here, that is not the case. Indeed, defendants' counsel were in the Western District on Monday, May 5, 1975, on their own motions to dismiss and/or for summary judgment.

# 2. The Deposition Should Be Allowed.

Should this Court consider the motion for a protective order on its merits, it should deny that motion. The notice is not burdensome, the depositions will be held at the defendants' place of choice, and the issues are fully germane to the proceeding. As to the claims of jurisdiction, etc., these will be decided shortly by the Western District and are not grounds for any action by this Court.

Finally, the arguments about privilege are frivolous: the Regents are a state agency who administer the state school systems. Its members are charged both individually and as a body. They are no more immune to deposition respecting possibly unconstitutional conduct than any other state officials and administrators.

Respectfully submitted,

HERMAN SCHWARTZ, ESQ. Attorney for Plaintiffs

New York Civil Liberties Union Foundation 525 O'Brian Hall SUNYAB North Campus Amherst, New York 14260 (716) 636-2091

DATED: Amherst, New York May 8, 1975 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, et al.,

Plaintiffs,

-vs
JOSEPH W. McGOVERN, etc., et al.,

Defendants.

State of New York )
County of Eric ) ss.:
Town of Amherst )

MERMAN SCHWARTZ, being duly sworn, deposes and says:

- 1. As set forth in plaintiffs' motion papers of April 1, 2, 1975, copies of which are annexed hereto, plaintiffs moved this Court to order defendants to bring their motion for a protective order in the United States District Court for the Western District of New York, where the case is pending, instead of in the Northern District. A copy of defendants' motion is submitted herewith.
- 2. Through a typographical oversight, the return date for such motion was inadvertently omitted; plaintiffs' affidavit, 17, makes it clear that the motion was to be returnable on April 7, 1975. A copy of that motion is attached and incorporated herein.
- 3. The fact that the defendants have filed their motion for a protective order in the Northern District cannot make the issue moot, for deciding the controversy over the propriety of \_/ that motion in the Northern District is not resolved.
- 4. A study of defendant's motion papers bears out plaintiffs'
  position that defendants' motion for a protective order can and should be
  decided solely in this Court. Almost all of the arguments presented by

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them relate to issues which this Court will have to decide, as follows:

"1. That the questions sought to be propounded and records and material sought by plaintiffs are wholly irrelevant to the subject matter involved in the said action and complaint pending in the United States District Court for the Western District.

MINA

"2. That the said questions and materials govern matters which are privileged, and that such questions represent a wholly unwarranted invasion of the executive decision-making process.

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"3. That the said questions and materials would cause the parties and other persons involved, annoyance, oppression and undue burden and expense.

"4. That there is presently pending a motion to dismiss the said action and complaint in the said cause, on the merits, which said motion is returnable on April 7 before the United States District Court for the Western District of New York, sitting in Buffalo, and that pending the letermination of said motion to dismiss the action and proceeding berein, all further proceedings in relation to the taking of said depositions should be prohibited by the Court.

MAJustus

"5. That the jurisdiction of the United States District Court for the Western District of New York is challenged by said motion to dismiss, on several well-founded rounds, and that the sufficiency of the complaint is also challenged on several well-founded grounds, and that the Court should therefore not allow discovery when jurisdiction is doubtful and when the sufficiency of the complaint is likewise subject to the most serious doubt."

Notice of Motion for Protective Order, pp. 2-3.

With to

- 5. As can be seen almost all relate to the merits and fundamental issues in this litigation. Thus,
- studying the complaint and the motions to dismiss.
- (b) Point 2. asserts privilege, which will obviously be a continuing issue in this case, to be raised on Rule 34, Rule 33, and Rule 36 motions.
- (c) Point 3. asserts expense and harassment. That can obviously be handled in this Court, and should be, for it involves consideration of how vital the depositions are, how broad the scope, etc.

- (d) Point 4. asserts that a motion to dismiss is pending.

  Obviously, therefore, the protective order decision can best be handled where the motion to dismiss will be.
- (e) Point 5. urges that this Court has no jurisdiction. But again, that can only be decided by this Court, and protective orders have to be geared to such a decision.
- 6. In sum, all of the points raised by defendants in their motion for a protective order involve an extensive familiarity with the merits of this case, and with the detailed contentions of the motion to dismiss, to be decided by this Court.
- 7. This Court has the inherent power to protect its jurisdiction under 28 U.S.C. §1651 and to avoid piecemeal proliferation of the issues in different districts.
- 8. The provision of Rule 26(1) which allows for a protective order to be sought in other districts is aimed at the situation where a deposition is sought in a case pending in a court distant from the place of deposition, to avoid a challenge having to be brought at great time and expense in a court distant from the witness's home. Here, we have no such situation. Defendants' lawyers have moved to dismiss in this Court, and can exily bring their motion for a protective order here as well. Indeed, it is difficult to understand why they brought their motion for a protective order in a different court than this since the Court would have to familiarize itself with the complaint and the merits and for no conceivable sound reason.

WHEREFORE, your deponent requests that this Court order defendants to bring their motion for a protective order in this Court rather than in the Northern District of New York.

Respectfully submitted,

JUNE LICENUE

HERMAN SCHWARTZ

Sworn to before me this \_\_\_\_\_\_\_ day of April, 1975

Notary Public

Notary Public. State of How York

Qualified in Eric County

My Commission Expires March 30, 19.226

## Certificate of Service

I hereby certify that on April 16, 1975, I mailed copies of the within Motion and Affidavit to John P. Jehu, Esq., and Edward L. Robinson, Esq., counsel for defendants. UNITED STATES COURT OF APPEALS SECOND CIRCUIT

MARY ANDERSON, et al.,

Plaintiffs-Appellees,

-v-

PH W. McGOVERN, et al.,

Defendants-Appellants.

CIVIL APPRAL
SCHEDULING ORDER

Docket No. 75-7331

Noting that Robert D. Stone, Esq. and John P. Jehu, Esq. counsel for appellants has filed a motion to reinstate appeal and the order entered August 28, 1975 granting motion to reinstate and to issue proposed Scheduling Order No. 2 and being advised as to the progress of the appeal, Civil Appeal Scheduling Order dated July 3, 1975, upon consent of Stuart Cohen, Esq., counsel for claintiffs-appellees, is modified only in the following respects:

TT-IS-MEREDY ORDERED that the record on appeal be filed on or before October 5, 1975;

IT IS FURTHER ORDERED that the appellant's brief and the int appendix be filed on or before December 1, 1975;

IT IS FURTHER ORDERED that the brief of the appelled be tilled on or before January 2, 1976;

IT IS FURTHER ORDERED that the argument of the appeal ready to be heard during the week of February 24, 1976;

IT IS FURTHER ORDERED that in the event of default by sollant in filing the record on appeal or the appellant's brief the appendix by the time directed or upon default of the sollant regarding any other provision of this order, the appeal will be disrissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL PUSARO Clerk

Dated: 700 101915